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SUPREME COURT OF THE UNITED STATES.

No. 121.

F. SURGETT, APPT.,

vs.

P. M. LAPICE AND AL.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR LOUISIANA.

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J. & G. S. Gideon, printers.

Be it remembered that, on the third day of December, in the year one thousand eight hundred and forty-one, the defendants, by their attorneys, R. N. & A. N. Ogden, esquires, came into court and filed the following transcript, to wit:

Pleas before the ninth district court of the State of Louisiana, in and for the parish of Concordia.

STATE OF LOUISIANA, *parish of Concordia:*

Be it remembered that, on the 10th day of April, A. D. 1840, Peter M. Lapice, and Edward Whittlesy, by their attorney, D. S. Stacey, esq., filed in said court their petition in the words and figures following, viz:

To the honorable the judge of the ninth judicial district of the State of Louisiana, holding sessions of the district court in and for the parish of Concordia.

Petition.

The petition of Peter M. Lapice, residing in the parish of Concordia, and of Edward Whittlesy, residing in the city of New Orleans, respectfully shews:

That your petitioners are the equal and undivided owners and possessors of a tract of land situate in the parish of Concordia, containing, in the aggregate, one thousand and fifty-four $\frac{63}{100}$ acres, situate in township No. 5, of range No. 9 east, in the district of lands north of Red river, and composed of the following lots, parcels, or fractional sections of land, to wit, the southeast quarter of section No. 59, containing one hundred and sixty-one $\frac{24}{100}$ acres, as per receiver's receipt No. 1641; also, lot No. 1, of section No. 61, containing one hundred and two $\frac{92}{100}$ acres, as per receipt 1642; also, fractional qr. of section No. 60, containing two hundred and thirty-six $\frac{98}{100}$ acres, as appears by receipt 1640; also, lot No. 2, of Section No. 61, containing eighty $\frac{76}{100}$ acres, as appears by receipt No. 2945; also, northeast quarter and east half of southwest quarter of section No. 59, containing two hundred and forty-one $\frac{86}{100}$ acres, as appears by receipt No. 2946; also, the east half of southeast quarter of section No. 58, containing eighty and $\frac{29}{100}$ acres, as appears by receipt No. 2947; also, west half of southeast quarter and east half of southwest quarter of section No. 58, containing one hundred and sixty $\frac{38}{100}$ acres; said land having been purchased of the United States by your petitioner Whittlesy, and by one Edward Sparrow, joint and equal purchasers; all which will appear by the aforesaid receiver's receipts, which will be exhibited upon the trial of this cause. That by public act, passed the 28th day of February, A. D. 1840, the said Edward Sparrow sold, transferred, and delivered to your petitioner, Peter M. Lapice, the one undivided half of all the aforesaid tracts of land owned by him, which will be proven by an authentic act to be produced on the trial of this cause.

Shews, that one Francis Surgett, residing in Adams county, in the State of Mississippi, has heretofore, at various times, and on divers occasions, slandered the title of your petitioners to the aforesaid tracts of land, and still continues to do so by giving out in speeches and otherwise, and public proclaiming, that he the said Surgett is the rightful and true owner of said tracts of land, and not your petitioners; alleging that the said Whittlesy and Sparrow acquired from the United States no legal and valid right thereto, and threatening the said Sparrow and your petitioners with a suit to recover the same; that your petitioners and the said Sparrow, while part owners, have frequently requested said Surgett to desist from the slandering their said title, or to bring suit to establish his own title thereto, if any he has; but he has refused, and still refuses, either to desist or to bring suit as requested; that said acts of the said Surgett has damaged your petitioners five hundred dollars.

Shews, that the said Surgett is an absentee, residing out of the State of Louisiana, having no known agent in it, and for the administration of whose property no curator has been appointed; that said Edward Sparrow, sheriff of the parish of Concordia, is a vendor, with general warranty to your petitioner Lapice, interested in the event of this suit, and incompetent to make service of process therein; and that there is no coroner in office in the parish of Concordia.

Wherefore, petitioners pray that a *curator ad hoc* may be appointed to represent the said Francis Surgett, to receive service of process, and make defence for him, provided service cannot be made personally upon said Surgett; that a person be appointed to make service of process in this suit; that, after due proceedings had, the said Surgett be ordered to set forth his title to the tracts of land described in the aforesaid petition, if any he has, and establish it contradictorily with your petitioners; that unless he produces a good title paramount to your petitioners, that judgment be rendered in their favor, quieting them in their title and possession of said land, and that the said Surgett may be forever enjoined from setting up any claim or pretensions to the same; that your petitioners recover five hundred dollars damages against the said Surgett, and the costs of suit to be taxed, and for general relief in the premises, &c.

D. S. STACY,
Attorney for petitioners.

Appointment of curator ad hoc.

Having read and considered the within petition, it is ordered, that James Dunlap, esq., be appointed "*curator ad hoc*" to represent in this suit the absentee Francis Surgett, and that Allen Wheelock be appointed to make service of the necessary process in said suit.

2*d April*, 1840.

FRED. H. DAVIS,
Judge 9th district.

THE STATE OF LOUISIANA:

Citation.

P. M. LAPICE and al.
vs.
FRANCIS SURGETT. } No. 572.

NINTH DISTRICT COURT, *parish of Concordia:*

To Francis Surgett, residing in Adams county, State of Mississippi.

You are hereby summoned, cited, either to comply with the demand contained in the petition of the said P. M. Lapice and al., of which a copy accompanies this citation, or to deliver your answer to the said petition in the office of the clerk of said court, held in the town of Vidalia, in said parish, within fifteen days after service thereof.

Witness the honorable B. G. Taney, judge of the said court. Signed, sealed, and delivered this 11th day of December, 1840.

[SEAL.]

W. T. PRAUD,
Clerk of said court.

Sheriff's return on citation.

Received on the 21st day of December, 1840, and served on the same day a duly certified copy of this citation, and of the petition, by leaving the said copies with Francis Surgett, in person, in this parish.

A. C. HUNTER, *Sheriff.*

Filed 21st December, 1840.

W. T. PRAUD, *Clerk.*

Order of court.

P. M. LAPICE and al.
vs.
FRANCIS SURGETT. } No. 572.

R. J. Laurence, esq., appointed curator ad hoc to represent the defendant, absentee, and cause continued.

Order of court.

P. M. LAPICE,
vs.
FRANCIS SURGETT. } No. 572.

The defendant having failed to appear, either in person or by his advocate, and the legal delay having expired, judgment by default is rendered against him.

Bond for the removal of cause.

DISTRICT COURT, *parish of Concordia:*

PETER M. LAPICE AND EDW'D WHITTLESY
vs.
FRANCIS SURGETT.

Know all men by these presents, that we, Francis Surgett, residing

in Adams county, State of Mississippi, as principal, and John Routh, a resident of the parish of Concordia aforesaid, as security, are held and firmly bound, unto Peter M. Lapice and Edward Whittlesy, in the just and full sum of one thousand dollars, for the payment of which we hereby bind ourselves, our heirs and executors, firmly by these presents, dated this 10th day of June, 1841.

Whereas the said Francis Surgett has this day filed in the district court aforesaid, of the parish of Concordia, his petition for the removal of aforesaid cause of Peter M. Lapice and Edward Whittlesy, for trial into the next circuit court of the United States, to be holden for the eastern district of Louisiana, at the city of New Orleans, on the third Monday of December next, under the 12th section of the act of Congress, approved September 24th, 1789, providing for such removal.

Now, therefore, the condition of the above obligation is such, that if the said Francis Surgett shall enter in the said circuit court of the United States, for the eastern district of Louisiana, at the next session of said court, to be holden as aforesaid, copies of the process against him in the aforesaid suit, and also there appear, for whatever purpose it may be requisite, then this obligation to be void, otherwise to remain in full force and virtue.

In testimony whereof, witness our hands, this 10th day of June, 1841, at the parish of Concordia aforesaid.

F. SURGETT,
JOHN ROUTH.

In presence of—
W. T. PRAUD.

W. T. PRAUD, *Clerk*.

Filed 10th June, 1841.

W. T. PRAUD, *Clerk*.

Petition of defendant to remove cause.

In the district court of the parish of Concordia, ninth judicial district, State of Louisiana.

PETER M. LAPICE AND EDWARD WHITTLESY,
vs.
FRANCIS SURGETT.

And now comes into court the said Francis Surgett, cited to answer the petition exhibited against him by the said Peter M. Lapice and the said Edward Whittlesy, and represents to this honorable court that he, respondent, is a citizen and resident of the State of Mississippi, and they, the said plaintiffs, are both citizens and residents of the State of Louisiana, in the eastern district of said State. And your petitioner, therefore, claims this right of removing this suit to the circuit court of the United States for the eastern district of Louisiana, to be holden in the city of New Orleans, on the Monday of next, and prays that your honorable court would order the said cause to be removed on respondent's entering into bond and security for his entries in said United States circuit court, on the first day of its next session, copies

of the process against him, and for his there appearing for whatever purpose it may be requisite, and prays that your honorable court would fix the amount of the bond so to be given aforesaid. And your respondent is ready to tender good and sufficient security in such amount as may be fixed, and offers as his said security

R. N. & A. N. OGDEN, *Atty's for resp't.*

The aforesaid Francis Surgett, being duly sworn, declares and says, that the matters and things above set forth are true, and that the value of the matter in dispute in the aforesaid suit exceeds the sum of five hundred dollars, exclusive of costs.

F. SURGETT.

Sworn to and subscribed in open court, 9th June, 1841.

W. T. PRAUD, *Clerk.*

On examination of this petition and accompanying affidavit, it appearing to the court that the plaintiffs are both citizens of Louisiana, and the defendant a citizen of Mississippi, and the value of the matter in dispute exceeds the sum of five hundred dollars, it is therefore ordered that this cause be removed to the United States circuit court for the eastern district of Louisiana, to be holden on the 3d Monday of December next, at the city of New Orleans; and that the bond tendered by the defendant, with John Routh as security, for the sum of one thousand dollars, conditioned for the entries in the said court by the defendant, as required at its next session, copies of the process against him in this suit be *excepted* as sufficient.

Done and signed in open court, this 25th day of June, A. D. 1841.

B. G. TENNY, *Judge 9th district.*

Filed 11th June, 1841. W. T. PRAUD, *Clerk.*

STATE OF LOUISIANA, *parish of Concordia, ninth district court, Clerk's Office, Vidalia:*

I, William T. Praud, clerk of the ninth district court, of the State of Louisiana, do hereby certify, that the foregoing pages numbered 1 to , inclusive, contain a true and correct transcript of all documents on file, as well as of all proceedings had in the suit, wherein Peter M. Lapice and Edward Whittlesy are plaintiffs, and Francis Surgett, defendant, numbered 572 on the docket of said court.

In testimony whereof, I have hereunto signed my name, and affixed the seal of said court, this 25th day of June, anno domini one [SEAL.] thousand eight hundred and forty-one.

(Sig'd) W. T. PROWD, *Clerk of said court.*

And on the same day, to wit, the 3d of December, 1841, the following answer was filed:

PETER M. LAPICE AND EDWARD WHITTLESY vs. FRANCIS SURGETT. } No. 872.

Before the United States circuit court for the eastern district of Louisiana, holding its session at the city of New Orleans.

The answer of Francis Surgett, a citizen of the State of Mississippi, residing in Adams county, in said State, to the petition of Peter M. Lapice and Edward Whittlesy, exhibited against him in the above entitled cause, which has been removed to this honorable court from the district court of Concordia, conformably to a special act of Congress, respectfully represents: That respondent denies specially and generally the allegations in the said plaintiffs' petition contained, except so far as may be hereinafter admitted, and denies specially that they, the plaintiffs, or either of them, are now, or ever have been, in possession of any part of the land described in their petition, or that they have any title whatsoever to such part of said land as is claimed by this respondent. For further answer respondent shows that, on the 21st of November, 1829, he purchased from the Government of the United States the following sections of land, fronting on the river Mississippi, viz: Section No. 28, in township No. 5, of range No. 9 east, containing one hundred and sixty-three $\frac{46}{100}$ acres; section No. 29, in township No. 5, of range No. 9 east, containing one hundred and sixty-seven $\frac{14}{100}$ acres; section No. 30, in township No. 5, of range No. 9 east, containing one hundred and sixty-one $\frac{24}{100}$ acres; section No. 31, in township No. 5, of range No. 9 east, containing one hundred and fifty-eight $\frac{18}{100}$ acres; section No. 32, in township No. 5, of range No. 9 east, containing one hundred and sixty-six $\frac{54}{100}$ acres; and section No. 33, in township No. 5, of range No. 9 east, containing one hundred and seventy-two $\frac{53}{100}$ acres, for which lands he has a perfect title from the United States. That an act of Congress, approved 15th of June, 1832, entitling respondent to a preference in becoming the purchaser of any vacant tract of land adjacent to and back of his own tract, not exceeding forty arpents, French measure, in depth, nor in quantity of land that which was contained in respondent's front tract; and under a subsequent act of Congress, approved the 24th January, 1835, supplemental to the first act, and extending the time allowed to front proprietors to enter their back lands to the 15th June, 1836.

Your respondent did, on the 26th of May, 1836, enter a written notice with the register of the land office at Ouachita, of his claim as front proprietor of the above described tracts of land to the back concessions, being the quantity of land in the rear of his front lands to which he was entitled by virtue of the aforesaid acts of Congress. And that your respondents did at the same time tender to the proper receiver of the said land office payment for said back concessions, as required by the act of Congress, which payment the said receiver refused. Respondent further shews, that the claim of your respondent as aforesaid was not recognised by the commissioners of the land office, and that they refused to receive the price tendered by him for said lands, on the ground, as alleged by them, that the land which he claimed as a back concession fronted on another bayou, and that your respondent's right was excluded by the *proviso* in the act of Congress, which declares that this right of pre-emption shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water course. Now, your respondent avers, and is ready to prove, that the lands to which he is thus entitled as a back concession do not border on

any river, creek, bayou, or water course. And your respondent alleges that, by virtue of the aforesaid acts of Congress, and the claim entered by your respondent, and tender of the money aforesaid, he is entitled, as owner, to an equal quantity of land in the rear of his aforesaid front tracts. And he avers his readiness at all times to pay over to the United States the price thereof.

Respondent alleges that the plaintiffs have illegally and unjustly set up claim, by virtue of the titles set forth in their petition, to the aforesaid back concessions of your respondent, of which your respondent avers he is himself in possession, and now assuming the capacity of plaintiffs. Respondent pleads in reconvention that he himself is the true and lawful owner of so much of the said lands claimed by the plaintiffs as are embraced in the aforesaid back concessions claimed by him, and prays that he may be decreed to be the legal owner thereof; that the certificates granted by the commissioners of the land office to Sparrow & Whittlesy, or either of them, may be avoided and annulled; and that if patents have already issued in their favor for said lands, the plaintiffs may be decreed to convey all their right, title, and interest, by virtue of said patents, to your respondent; that he may be quieted in his title and possession thereof, and may recover judgment against said plaintiffs for the sum of one thousand dollars damages, sustained by him in consequence of their illegal pretensions, and for general relief in the premises.

And, as in duty bound, &c.

(Sig'd) PRESTON & R. N. & A. N. OGDEN,
Atty's for def'ts.

And on the same day, to wit, the 3d of December, 1841, the following interrogatories were filed:

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT.

Pending in the United States circuit court for the eastern dist. of La.

Interrogatories to be propounded, on the part of the defendant, to the following witnesses, residing in the parish of Concordia, whose answers will be read in evidence on the trial of the cause, viz: William Dix, Benjamin Glasscock, James Crossgrove, John Griffis, and Johnson:

1st. Do you know the parties to this suit, and are you acquainted with the subject-matter of controversy between them?

2nd. Do you know the plantation belonging to Francis Surgett, on the river Mississippi, in the parish of Concordia, about twenty-four miles below the town of Vidalia; and are you acquainted with the lands, and the country generally, in the rear of said plantation?

3rd. Do you know the lands in the rear of said plantation, said to have been entered by Sparrow & Whittlesy?

4th. Will you state whether there is any bayou, river, creek, or water course, in the rear of said plantation, or anywhere in its neighborhood;

or whether the lands claimed under the alleged entries of Sparrow & Whittlesy are fronting on any bayou, river, creek, or water course; and if there is any such bayou, river, creek, or water course, please describe it particularly; and state whether it is navigable; and whether it is a running stream during all the year, or whether it only flows during high water; during how many months in the year; at what season of the year does it flow; is it dry during any months of the year, and if so, what months? Is it ever a running stream in a dry season, and when the river Mississippi is low; where does it have its source, and what is its length?

Int. 5. Please examine the annexed document, marked ("A,") purporting to be a copy of a map of township 5, range 9 east, and state whether the lands you have reference to are the same as represented on that map as being in the rear of sections 28, 29, 30, 31, 32, and 33, marked in the name of Francis Surgett; and if, in answer to the foregoing interrogatories, you have not already particularly described what appears on the said map to be an outlet from a lake intersecting a part of defendant's front land, please now describe it particularly; state by what name the said outlet is called; whether it is a running stream; whether it flows during all the year; whether it is navigable; whether it is ever dry; and, if so, during how many months in the year; describe also, if you please, what appears to be the lake represented on that map, and give as accurate a description of both as you can, in respect to their length, width, and depth, and stages of water at different seasons of the year?

6th. Are you acquainted with any bayous formed by the drains from the bends of the Mississippi, on which the front planters have entered their back tracts; if so, how do such as you are acquainted with compare as to size and as to quantity of water, and the time it remains during the year, with the bayou or water course in the rear of defendant's plantation?

7th. Please state any facts within your knowledge, not already stated, material to the defendant, as fully and particularly as if interrogated thereto.

(Sig'd) PRESTON & R. N. & A. N. OGDEN,
Atty's for deft.

And on the 27th of January, 1842, the following cross interrogatories were filed, to wit:

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

Ninth judicial circuit court of the United States for the eastern district of the State of Louisiana:

The plaintiffs, by their counsel, except and object to the interrogatories propounded by the defendant to the witnesses, Wm. Dix, Benjamin Glasscock, James Crossgrove, John Griffis, and Johnson, and pray that the same may be stricken out as leading and improper

questions, and reserving all legal exceptions to the answers thereto, proceed to propound the following cross interrogatories, which, in case those propounded by defendant are not stricken out, they pray may be read, and the answers thereto received upon the trial of this cause.

Cross int. 1. If you answer the last part of the first interrogatory in the affirmative, state *particularly* what the subject-matter of the controversy is.

2nd. If you say that there is any bayou or water course upon the lands in controversy, state particularly what the name of it is; and if there was, or was not, a saw-mill upon it at one time; and if the mouth of the said bayou has not been obstructed by a levee built across it by the defendant, Surgett, or some other person or persons; and, if so, by whom, and when. Is or is not the land upon the bayou arable land, and secure from inundation at any time, except when the Mississippi river is high enough to overflow a large part of the land in the neighborhood, and the parish generally, which is considered arable? Is or is not a considerable portion of the land in controversy good arable land; or what portion of it is of that description?

Cross int. 3. If you answer that a levee has been built across the mouth of the bayou, state particularly if the levee does not prevent the water, at one time of the year, from flowing from the Mississippi river, and at another time from flowing from the bayou into the river; or what has been the effect of the levee; and how large is it.

4th. If you state, in answer to the 5th interrogatory, that the lands you have referred to are the same represented on the map as being in the rear of sections 28, 29, 30, 31, 32, and 33, state particularly within what lines they are included; in what direction the different parts of them lie from the said front lots; and if all the land in controversy is directly in the rear of the said lots, in running back from the river; and, if not, what portion lies either above or below a direct line, running at right angles from the river.

5th. If you answer the first part of 6th interrogatory, propounded by defendant, affirmatively, state particularly whether such back tracts had been previously offered at public sale by the United States; and whether they had been previously entered by third persons, and their titles confirmed by patent; and if they were of as good quality, and as great a portion of them high and arable, as there is of the land in controversy.

6th. Please, under this general interrogatory, state any other facts material to plaintiffs as particularly and fully as if interrogated thereto.

(Sig'd) STACEY & SPARROW,
Atty's for plaintiffs.

(For commission, see page 61.)

And on the 17th of November, 1842, the following interrogatories and cross interrogatories were filed, to wit:

(For commission, see page 38.)

3/0.

LAPICE & WHITTLESY
vs.
FRANCIS SURGET.

In the United States circuit court for the eastern district of Louisiana:

Interrogatories to be propounded to Henry O. McErny, register of the land office in Ouachita, a witness for defendant, whose answers will be read in evidence on the trial of this cause:

1st. Please refer to the township map, in your office, shewing the location of sections Nos. 27, 28, 29, 30, 31, 32, and 33, in township No. 5, range 9 east, fronting on the river Mississippi, in the parish of Concordia, and the entries made by E. Sparrow, or Whitlesy, or Sparrow & Whittlesy, in the rear of these sections; at what time were the lands so entered by Sparrow & Whittlesy, or by either of them, offered at public sale, under the proclamation of the President? Please, in your answer, enumerate the numbers of the different lots entered in the rear of F. Surget's lands; and state in whose name so entered; and how long previous to those entries the land had been offered at public sale; if they were ever so offered at public sale.

2nd. Please examine the records of your office, and say whether there is evidence of record there to shew the date of the President's proclamation for the sale of said land, and when they were actually offered for sale. Please annex to your answer certified copies of such record to prove these facts.

3d. If you know any facts material to the defendant, please state them, as fully and particularly as if interrogated thereto.

(Sig'd) R. N. & A. N. OGDEN,
Atty's for def'ts.

Cross interrogatories propounded by plaintiff's counsel.

Interrogatory 1st. Was or was not, at the time of the entries made by Sparrow and Whittlesy, referred to in plaintiff's interrogatories, or by either of *their* affidavits filed in the office, shewing the description or character of the land entered? If yea, please insert in your answer a true copy of such affidavit or affidavits.

2d. Under this general interrogatory, please state any thing you may know of advantage to plaintiffs.

(Signed) STACY & SPARROW,
Attorneys for plaintiffs.

And on the same day, to wit, the 17th of November, 1842, the following entry was made on the minutes, to wit:

LAPICE & WHITTLESY
vs.
FRANCIS SURGET. } No. 872.

On motion of R. N. and A. N. Ogden, attorneys for defendant, it is ordered, that a commission issue to the parish judge of the parish of Ouachita, to take testimony on the interrogatories and cross interrogatories filed by the parties.

And on the 6th of April, 1844, the following entry was made on the minutes, to wit:

SATURDAY, *April 6th*, 1844.

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

On motion of defendant's attorney, and on suggesting to the court that the duties of plaintiff's attorney would incapacitate him for trying the cause this day, the same was laid over.

And on the 9th of May, 1844, the following entry was made on the minutes, to wit:

THURSDAY, *May 9th*, 1844.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

By consent of parties, it is ordered that a jury be awarded in this case.

And on the 6th of January, 1845, the following entry was made on the minutes:

MONDAY, *January 6th*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

Cause continued until Monday, the 20th instant.

And on the 20th of January, 1845, the following entry was made on the minutes, to wit:

MONDAY, *January 20th*, 1845.

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

This cause, having been assigned for hearing this day, came on for trial, W. Dunbar, esq., appearing for the plaintiffs, and A. N. Ogden, for the defendant; when the death of Edward Whittlesy, one of the plaintiffs, being suggested, on motion of W. Dunbar, esq., it is ordered that the time be extended to make the heirs and representatives of said Whittlesy parties to this suit; and the cause be reassigned for trial for Friday, the 21st February, 1845. By consent of parties, trial by jury waived.

And on the 21st of February, 1845, the following entry was made on the minutes, to wit:

FRIDAY, *February 21st*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

By consent of parties, this case is continued until Monday next, at 10 o'clock, A. M.

And on the same day, to wit, the 21st of February, 1845, the following amended petition was filed:

IN THE CIRCUIT COURT OF THE UNITED STATES,
Eastern district of Louisiana.

P. M. LAPICE & E. WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

Thomas Alexander, a resident of the parish of Concordia, in said district, respectfully shews your honorable court, that he has been duly and legally appointed curator of absent heirs of the succession of the plaintiff, Edward Whittlesy, deceased, by the probate court of the parish of Concordia, and prays that he may be allowed in that capacity to appear and prosecute this suit, and be made a party thereto.

He prays further, that such judgment may be rendered in his favor as is prayed for in the original petition, filed in this case; which petition he adopts and makes his own, and he prays for general relief.

(Signed) STACY & SPARROW,
And WILLIAM DUNBAR,
For petitioner.

And on the same day the following answer was filed:

UNITED STATES CIRCUIT COURT,
Eastern district of Louisiana.

P. M. LAPICE & EDWARD WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

The defendant, answering to the petition of Thomas Alexander, curator of the absent heirs of Edward Whittlesey, pleads all the same matters in defence contained in his original answers, and renews the prayer for relief as contained in said answer.

(Signed) R. N. & A. N. OGDEN,
Attorneys for defendants.

And on the 24th of February, 1845, the following entry was made on the minutes, to wit:

MONDAY, *February 24th*, 1845.

LAPICE & WHITTLESEY
vs.
FRANCIS SURGETT. } No. 872.

This cause came on to be tried before the court, E. Sparrow and W. Dunbar, esq's., for the plaintiffs, and I. T. Preston and A. N. Ogden, esq's., for the defendant; when, after some progress therein, the hour of 4 o'clock having arrived, the cause was postponed for further consideration until to-morrow, at 10 o'clock, A. M.

And on the 25th of February, 1845, the following entry was made on the minutes, to wit:

TUESDAY, *February 25th*, 1845.

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

The trial of this cause was this day resumed before the court, W. Dunbar and E. Sparrow, esq's., appearing for the plaintiffs, and I. T. Preston and A. N. Ogden, esq's., for the defendant; when the evidence on behalf of both parties having concluded, the case was continued until to-morrow, at 10 o'clock, A. M., for argument.

And on the 10th of March, 1845, the following entry was made on the minutes, to wit:

MONDAY, *March 10th*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

On motion of W. Dunbar, esq., it is ordered that this case be assigned for argument for Thursday next.

And on the 15th of March, 1845, the following entry was made on the minutes, to wit:

SATURDAY, *March 15th*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

The argument herein was this day taken up before the court, when, after some progress therein, the same was laid over until Monday next, at 10 o'clock, A. M.

And on the 17th of March, 1845, the following entry was made on the minutes, to wit:

MONDAY, *March 17th*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

The argument of counsel was this day resumed before the court, W. Dunbar, esq., appearing for the plaintiff, and A. N. Ogden, esq., for the defendant; when, after some progress therein, the same was continued until to-morrow, at 10 o'clock, A. M.

And on the 18th of March, 1845, the following entry of record was made, to wit:

TUESDAY, *March 18th*, 1845.

LAPICE & WHITTLESEY
vs.
F. SURGETT. } No. 872.

The argument of counsel was this day resumed and closed, when the court took the case under advisement.

And on the 7th of April, 1845, the following judgment was rendered, to wit:

MONDAY, *April 7th*, 1845.

The court met pursuant to adjournment.

Present, the honorable Theo. H. McCaleb, district judge. The honorable John McKinley, presiding judge, absent.

LAPICE & WHITTLESY vs. FRANCIS SURGETT. } No. 872.

The court having duly considered the law and the evidence in this case, doth now order, adjudge, and decree, that the plaintiffs Lapice & Whittlesy be quieted in their title to, and possession of, the land set forth and described in their petition, and that the defendant, Francis Surgett, be forever enjoined from setting up any claims or pretensions to the same. It is further ordered, adjudged, and decreed, that the said defendant do pay the costs of this suit.

Judgment rendered, April 7th, 1845.

Judgment signed, June 27th, 1845.

(Signed) THEO. H. McCALEB, [L. S.]
United States judge.

The following testimony was offered in evidence by plaintiffs, to wit:

Receiver's certificate, No. 1640, dated July 14th, 1834, marked A.

No. 1640. RECEIVER'S OFFICE AT OUACHITA, LA.,
July 14*th*, 1834.

Received from Ed. Sparrow and Ed. Whittlesy, of Concordia, La., the sum of two hundred and eighty-three dollars and seventy-three cents, being in full payment for the fractional section No. 60, in township No. 5, of range No. 9 east, containing two hundred and twenty-six $\frac{98}{100}$ acres, at $1 25 per acre.

$283 73. (Signed) A. A. ROLAND,
For JOSEPH FRIEND, *Receiver*.

Filed for record.

(Signed) G. W. KEETON, *P. Judge*.

STATE OF LOUISIANA, *parish of Concordia, ss:*

I certify the annexed receipt to be duly recorded in my office, in book G, at page 543.

In testimony whereof, I have hereunto set my hand, and the seal of my office, at Vidalia, this 3d June, A. D. 1836.

Receiver's certificate, No. 1642, dated July 14th, 1834, marked B.

No. 1642. RECEIVER'S OFFICE AT OUACHITA, LA.,
July 14*th*, 1834.

Received from Ed. Sparrow and Ed. Whittlesey, of Concordia, La.,

the sum of one hundred and twenty-eight dollars and sixty-five cents, being in full payment for the lot No. 1, quarter of section No. sixty-one, in township No. five, of range No. 9 east, containing one hundred and two $\frac{92}{100}$ acres, at $1 25 per acre.

$128 65 (Signed) A. A. ROLAND,
For JOSEPH FRIEND.

Filed for record 3d June, 1836.
(Signed) G. W. KEETON, *P. Judge.*

STATE OF LOUISIANA, *parish of Concordia, ss:*

I certify the annexed receipt to be duly recorded in my office, in book G, at page 543.

In testimony whereof, I have hereunto set my hand and the seal of my office, at Vidalia, this 3d June, A. D. 1836.

Receiver's certificate, No. 1641, dated July 14th, 1834, marked C.

No. 1641. RECEIVER'S OFFICE AT OUACHITA, LA.,
July 14th, 1834.

Received from Ed. Sparrow and Ed. Whittlesey, of Concordia, La., the sum of two hundred and one dollars and fifty-five cents, being in full payment for the southeast quarter of section No. fifty-nine, in township No. five, of range No. nine east, containing one hundred and sixty-one $\frac{24}{100}$ acres, at $1 25 per acre.

$201 55. (Signed) A. A. ROLAND,
For JOSEPH FRIEND, *Receiver.*

Filed for record 3d June, 1836.
(Signed) G. W. KEETON, *P. Judge.*

STATE OF LOUISIANA, *parish of Concordia, ss:*

I certify the annexed certificate to be duly recorded in my office, in book G, page 543.

In testimony whereof, I have hereunto set my hand and the seal of my office, at Vidalia, this 3d June, A. D. 1836.

Receiver's certificate, No. 2945, dated March 17, 1836, marked D.

No. 2945.—*(Duplicate.)*

LAND OFFICE AT OUACHITA, LA.,
17th March, 1836.

Received from Edward Whittlesy, of Concordia, La., the sum of one hundred dollars and ninety-five cents, being in full payment for the lot numbered two, quarter of section No. 61, in township No. five, of range No. nine east, containing eighty $\frac{76}{100}$ acres, at $1 25 per acre.

$100 95. (Signed) RAN. EASTIN, *Receiver.*

Filed for record 3d June, 1836.
(Signed) G. W. KEETON, *P. Judge.*

STATE OF LOUISIANA, *parish of Concordia, ss:*

I certify the annexed receipt to be duly recorded in my office, in book G, at page 543.

In testimony whereof, I have hereunto set my hand and the seal of my office, at Vidalia, this 3d June, A. D. 1836.

Patent No. 2946, dated June 20th, 1837, marked E.

Certificate No. 2946.

The United States of America, to all to whom these presents shall come, greeting:

Whereas Edward Whittlesey, of Concordia, Louisiana, has deposited, in the General Land Office of the United States, a certificate of the register of the land office at Ouachita, whereby it appears that full payment has been made by the said Edward Whittlesey, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the northeast quarter, and the east half of the southwest quarter, of section fifty-nine, in township five, of range nine east, in the district of lands subject to sale at Ouachita, Louisiana, containing two hundred and forty-one acres and eighty-six hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Edward Whittlesey.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Edward Whittlesy, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said Edward Whittlesy.

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. [L. S.]

Given under my hand, at the city of Washington, the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-first.

MARTIN VAN BUREN,

(Signed) By A. VAN BUREN, *Sec'y.*

By the President: (Signed) H. M. GARLAND,

Recorder of the General Land Office.

Recorded vol. 5, page 199.

Patent No. 2947, dated June 20th, 1837, marked F.

Certificate No. 2947.

The United States of America, to all to whom these presents shall come, greeting:

Whereas Edward Whittlesy, of Concordia, Louisiana, has deposited, in the General Land Office of the United States, a certificate of the register of the land office at Ouachita, whereby it appears that full payment has been made by the said Edward Whittlesy, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the east half of the southeast quarter of section fifty-eight, in township five, of range nine east, in the district of lands subject to sale at Ouachita, Louisiana, containing eighty-six acres [and] twenty-nine hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Edward Whittlesy.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Edward Whittlesy, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Edward Whittlesy, and to his heirs and assigns forever.

In testimony whereof, I, Martin Van Buren, President of the [L. S.] United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twentieth day of June, in the year of our Lord one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-first.

MARTIN VAN BUREN,

(Signed) By A. VAN BUREN, *Sec'y.*

By the President: (Signed) H. M. GARLAND,

Recorder of the General Land Office.

Recorded vol. 5, page 200.

Patent No. 3278, dated August 5th, 1837, marked G.

Certificate No. 3278.

The United States of America, to all to whom these presents shall come, greeting:

Whereas Edward Whittlesy, of Concordia, Louisiana, has deposited, in the General Land Office of the United States, a certificate of the register of the land office at Ouachita, whereby it appears that full payment has been made by the said Edward Whittlesy, according to the

provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the west half of the southeast quarter, and the east half of the southwest quarter, of section fifty-eight, in township five, of range nine east, in the district of lands subject to sale at Ouachita, Louisiana, containing one hundred and sixty acres and fifty-eight hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Edward Whittlesy.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Edward Whittlesy, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Edward Whittlesy, and his heirs and assigns, forever.

In testimony whereof, I, Martin Van Buren, President of the United [L. S.] States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifth day of August, in the year of our Lord one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-second.

MARTIN VAN BUREN.

By the President:

(Signed) By A. VAN BUREN, *Secretary.*

JOS. S. WILSON,

Acting Recorder of the General Land Office, ad interim.

Recorded, vol. 6, page 127.

Act of sale from Edward Sparrow and wife to P. M. Lapice, marked (H,) filed for record Feb. 28th, 1840.

STATE OF LOUISIANA, *parish of Concordia, ss:*

Be it remembered, that, on this twenty-eighth day of February, A. D. eighteen hundred and forty, before me, George W. Keeton, judge and *ex-officio* notary public in and for the said parish, duly commissioned and qualified, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared Edward Sparrow and Minerva Parker, wife of the said Edward Sparrow, of the parish and State aforesaid, by her said husband herein duly authorized and assisted, who declared and said, that, for and in consideration of the sum of sixteen thousand dollars, to them cash in hand paid by Peter M. Lapice, also of the said parish of Concordia, the receipt whereof is hereby acknowledged by the said Edward Sparrow before the signing of these presents, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said Peter M. Lapice, and to his heirs and assigns, forever, all the following mentioned and described tracts, pieces, or parcels of land

situate, lying, and being as follows, to wit: The southeast quarter of section No. thirty-two, in township No. eight, of range No. eight east, containing one hundred and sixty and $\frac{60}{100}$ acres, being the same quarter section entered at the land office at Ouachita, La., on the 29th day of November, 1839, by George B. Gifford, as per receipt of H. Holmes, the receiver, numbered 5,938, appears; also the whole of section No. thirty-three, in township No. eight, of range eight east, containing six hundred and forty-acres; also the west half of section No. thirty-four, in township No. eight, of range No. eight east, containing three hundred and twenty-acres; also the north half of section No. thirty-two, in township No. 8, of range No. 8 east, containing three hundred and twenty-one $\frac{21}{100}$ acres—these three last mentioned parcels were purchased at the sale of public lands at Ouachita, La., on the 14th December, A. D. 1839, by Edward Sparrow, this appearer, as appears by the receipts of H. Holmes, the receiver, numbered 6,269, 6,270, and 6,271, all of which afore described lands being situate in this parish, and lying on Brushy bayou, containing, in the aggregate, fourteen hundred and forty-one $\frac{80}{100}$ acres; also all the undivided half of the following described pieces, parcels, or tracts of land, to wit: The southeast quarter of section No. fifty-nine, containing one hundred and sixty-one $\frac{24}{100}$ acres, as per receipt No. 1,641 appears; also lot No. 1, of section No. 61, containing one hundred $\frac{92}{100}$ acres, as per receipt No. 1,642 appears; also fractional qr. of section No. sixty, containing two hundred and twenty-six $\frac{98}{100}$ acres, as appears by receipt No. 1,640; also lot No. two, of section No. sixty-one, containing eighty and $\frac{76}{100}$ acres, as appears by receipt No. 2,945; also northeast quarter and east half of southwest quarter of section No. 59, containing two hundred and forty-one $\frac{86}{100}$ acres, as per receipt No. 2,946 appears; also the east half of southeast quarter of section No. fifty-eight, containing eighty and $\frac{29}{100}$ acres, as appears by receipt No. 2,947; also west half of southeast quarter and east half of southwest quarter of section No. fifty-eight, containing one hundred and sixty $\frac{58}{100}$ acres; all of which said fractional sections contain, in the aggregate, one thousand and fifty-four and $\frac{63}{100}$ acres, being all situate in township No. five, of range No. 9 east, in the district of land north of Red river, and lying on Mill bayou, adjoining land belonging to Francis Surgett, Peter Little, and Benjamin F. Glasscock, purchased of the United States by Edw'd Sparrow, this appearer, with Edward Whittlesy as co-purchaser.

The consideration of the first mentioned fractional section on Brushy bayou is declared to be thirteen thousand five hundred dollars, and the consideration of the last mentioned fractional sections, (that is, the undivided half thereof,) as lying on Mill bayou, is declared to be two thousand five hundred dollars: To have and to hold unto the said Peter M. Lapice, and unto his heirs and assigns, forever, all the afore described land and premises, except the undivided half of the last mentioned tract belonging to Edward Whittlesy, together with the improvements thereon, or thereunto belonging, or in any wise appertaining, free from the

claim or claims of all persons whomsoever claiming or to claim the same.

And now, to these presents, personally came and intervened Mistress Minerva Parker, wife of the said Edward Sparrow, and by him herein duly authorized and assisted as aforesaid, who declared and said that she has taken full cognizance of what is hereinbefore written, and that she approves of the same in all its parts, and that it is her wish and desire, by these presents, to renounce in favor of the said Peter M. Lapice all her rights and privileges, of whatsoever kind or nature they may be, whether resulting from her marriage with the said Edward Sparrow, or otherwise, on all and every part of the afore described land and premises.

And I, the said judge and notary, did thereupon carefully explain to the said Mrs. Minerva Sparrow the nature of the contract she was about entering into, and by making her intended renunciation she would deprive herself forever of recourse upon the premises hereinbefore described, and verbally, apart and out of the presence and hearing of her said husband, informed her that, by the laws of this State a wife has a tacit mortgage upon all the property of [the] husband in this State in the following cases, to wit:

1st. For the restitution of her dowry, and for the reinvestment of the dotal property sold by her husband, and which she brought in marriage, reckoning from the marriage.

2nd. For the restitution or reinvestment of dotal property, which came to her after the marriage, either by succession or donation, from the day the succession was opened or the donation perfected.

3rd. For the indemnification of debts which she may have contracted jointly with her husband, and for the security of the obligations imposed on the husband, in case he should have had the administration of his wife's paraphernal property. And the said Mrs. Minerva Sparrow declared herself well acquainted with the nature and extent of the rights, privileges, and mortgages secured to her by the laws of this State, but that she still persists in her intention to renounce in favor of the said Peter M. Lapice aforesaid all her rights of mortgage, and doth by these presents formally and expressly renounce, in favor of said Lapice, all her rights *rights* whatsoever, upon all and every part of the afore described land and premises, and subrogates him to all her said rights, hereby binding herself and her heirs at all times to acknowledge and sustain the validity of this sale, and of this her *remuneration*.

And to these presents now came and appeared the said Peter M. Lapice, who declared that he accepts this act, with all its clauses, and that he waives and dispenses with the production of the certificate of the recorder of mortgages in and for said parish, as to any mortgages, liens, or incumbrances of any kind or nature whatever, which may exist of record in his office against the land and premises hereinbefore described, and that he holds harmless me, the said judge and notary, from all liability and responsibility for the passing of this act, without the production of the same.

Thus done and passed at my office, in the town of Vidalia, on the

day, month, and year first herein written, in presence of Horace B. Barbor and David S. Stacey, competent witnesses, residing in this parish, who have also signed this act with the said appearers, and me, the said judge and notary.

EDW'D SPARROW,
MINERVA SPARROW,
P. M. LAPICE.
G. W. KEETON, *P. Judge.*

HORACE B. BARBOUR,
D. S. STACY.

STATE OF LOUISIANA, *parish of Concordia, ss:*

I, James Dunlap, judge of said parish, do hereby certify *that* the foregoing to be a true copy of the original act now on file and of record in my office.

Witness my hand and seal of office this 17th day of May, A. D. 1841.

[SEAL.]

(Sig'd) JAMES DUNLAP, *Parish Judge.*

The following testimony was offered in evidence by defendant:

Patent No. 138, dated June 15th, 1837, and marked (AA.)

Certificate No. 138.

The United States of America, to all to whom these presents shall come, greeting:

Whereas Francis Surgett, of Mississippi, has deposited in the General Land Office of the United States a certificate of the register of the land office at Ouachita, whereby it appears that full payment has been made by the said Francis Surgett, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the lots numbered twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, and thirty-five, in township five, of range nine east, in the district of lands subject to sale at Ouachita, Louisiana, containing one thousand three hundred and eight acres and seven hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Francis Surgett.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Francis Surgett, and to his heirs, the said tract above described. To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Francis Surgett, and to his heirs and assigns, forever.

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made patent,

[L. S.] and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this fifteenth day of June, in the year of our Lord one thousand eight hundred and thirty-seven, and of the independence of the United States the sixty-first.

MARTIN VAN BUREN.

By the President:

(Sig'd) By A. VAN BUREN, *Sec'y.*

H. M. GARLAND,

Recorder of the General Land Office.

Recorded, vol. , page 221.

Application of F. Surgett to enter back concession, &c., &c.

"B."

I hereby apply to the register of the land office at Ouachita for the purchase of the following back concessions, as proprietor of the front lands purchased by me from the United States, per receipt of the receiver of public monies at Ouachita, No. 138, dated 21st November, 1829, to wit:

Back concession to section No. 28, in township No. 5, of range No. 9 east, containing 163 $\frac{46}{100}$ acres.

Back concession to section No. 29, in township No. 5, of range No. 9 east, containing 167 $\frac{14}{100}$ acres.

Back concession to section No. 30, in township No. 5, of range No. 9 east, containing 161 $\frac{24}{100}$ acres.

Back concession to section No. 31, in township No. 5, of range No. 9 east, containing 158 $\frac{18}{100}$ acres.

Back concession to section No. 32, in township No. 5, of range No. 9 east, containing 166 $\frac{54}{100}$ acres.

Back concession of section No. 33, in township No. 5, of range No. 9 east, containing 172 $\frac{53}{100}$ acres.

For F. SURGETT,

(Sig'd) O. SIMPSON, *Agent.*

Ouachita, May 20th, 1836.

By reference to the official township map, it will be seen tha the land called for in the above application is such as are exempted rom the right of back concession (so called) by the first proviso of th act under which the applicant claims, which reads, ("meaning the right to the back land,") shall not extend so far in depth as to include lanls fit for cultivation bordering on another river, creek, bayou, or water curse. Now, from the evidence in this office, the land embraced in the rar of the above lots or fractional sections is fronting on another bayou and that the same is fit for cultivation, the fact of a part being goodland, above or during high water mark, is on file herewith. Under tle circumstances of the case, the land called for in part have been enteed by other persons as public land, subject to private entry, and the application rejected so far as the action of this office can decide, subjectto the decision of the department.

REGISTER'S OFFICE, OUACHITA, LA.,
May 20th, 1836.

I, John M. A. Hamblen, register of the said land office, do certify the above and foregoing to be a true copy of the application, and my endorsement on the back thereof, and that the same is placed on file in my office.

Given under my hand and private seal of office, (not having a public one,) this day and date above.

JOHN M. A. HAMBLEN, *Regst.*

Payment for the land specified in the foregoing application having been tendered by O. Simpson, I have declined receiving it, for the reasons above assigned by the register.

RAN. EASTIN, *Recev'r.*

GENERAL LAND OFFICE, *September 25th*, 1839.

I hereby certify the foregoing to be a true copy, taken from the original on file in this office.

In testimony whereof, I have hereunto signed my name, and caused the seal of the General Land Office to be affixed, on the day [SEAL.] and date first above written.

(Sig'd) JAS. WHITCOMB,
Commissioner of the General Land Office.

On the 18th day of November, 1842, the following commission issued to Henry O. McEnery, to wit:

[For interrogatories and cross interrogatories, see page 16.]

Circuit court of the United States for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, to the parish judge of the parish of Ouachita, or any other judge or justice of the peace of said parish:

Know ye, that, reposing special trust and confidence in your integrity andability, we hereby authorize and require you that you call, and cause to ome before you, Henry O. McEnery, register of the land office at Ouchita, and him duly examine, on oath, touching and concerning certain matters and things in a case, now depending in the said court, wherein Lapice and Whitlesey are plaintiffs, and Francis Surgett is defendant; and the same examination, so taken and reduced to writing, youcertify, under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Cout of the United States, at the city of New Orleans, this eighteenth day of November, anno domini 1842, and the sixty-seventh year of the independence of the United States of America.

[SEAL.] D. N. HENNEN, *Clerk.*

(Sig'd) By H. B. PAGE, *Dep. Cl'k.*

Answers of Henry O. McEnery to the interrogatories propounded to him, and cross interrogatories, (see page 16.)

In the United States court for the eastern [district] of Louisiana.

LAPICE AND WHITTLESY
vs.
FRANCIS SURGETT.

The answers of Henry O. McEnery, register of the land office at Ouachita, La., a witness to the interrogatories propounded to him in the above entitled suit, now pending in said court, and pursuant to the annexed commission.

Answer to int. 1st. The lands entered by Edward Sparrow and Edward Whittlesy, jointly, and by Edward Whittlesy individually, in the rear of the front lots or fractional sections referred to in this interrogatory, were made as follows, to wit: By Sparrow and Whittlesy, on the 14th of July, 1834, fractional section No. 60, containing 226 $\frac{98}{100}$ acres, per certificate of purchase No. 1,640; southeast quarter of section No. 59, containing 161 $\frac{24}{100}$ acres, per certificate No. 1,641; and the lot No. 1, of section No. 61, containing 102 $\frac{92}{100}$ acres, per certificate of purchase No. 1,642. By Edward Whittlesy, on the 17th March, 1836, the northeast quarter, and east half of southwest quarter of section No. 59, containing 241 $\frac{86}{100}$ acres, per certificate of purchase No. 2,946; the east half of southeast quarter of section No 58, containing 80 $\frac{29}{100}$ acres, per certificate of purchase No 2,947; the lot No. 2, of section No. 61, containing 80 $\frac{76}{100}$ acres, per certificate of purchase No. 2,945; and again, on the 12th May, 1836, said Whittlesy entered, in his own name, the west half of southeast quarter, and east half of southwest quarter of section No. 58, containing 160 $\frac{58}{100}$ acres, per certificate of purchase No. 3,278.

The township (No. 5 north, of range No. 9 east,) wherein those lands are situated, was offered at public sale, pursuant to the President's proclamation, on the 3d Monday of November, 1829; which was nearly five years previous to the date of the first entry made in said township, by Sparrow and Whittlesy, of the lands above enumerated.

Answer to int. 2d. The President's proclamation, offering said township for sale, cannot be found on the files of my office, nor is there any evidence of record shewing the date when said township was offered, except a diagram of the land district, on which is written a cross, the township No. 5, R. 9 E., offered 3d Monday November, 1829; also Colonel Friend, formerly receiver, left on file a statement when all the townships up to that date, (18th April, 1832,) were offered at public sale, and under the head of lands offered at public sale on the 3d Monday of November, 1829, township No. five north, of range 9 east, is named in his statement.

Answer to int. 3d. "I know of none."

Answers to the cross interrogatories propounded by the plaintiff's counsel in said suit to the aforesaid witness.

Answer to cross interrogatory 1st. I have made diligent search in my

office for the affidavits referred to in this interrogatory, and the only one found on file is that of Doctor William Harriman's, dated two days prior to the last entry of Edward Whittlesy, per No. 3278, as mentioned in my answer to the first interrogatory in chief. I have herewith annexed a copy of said affidavit, and marked the same (A,) and which is made part of this answer; there is no endorsement on the said affidavit, stating when the same was filed, but as the register refers to some testimony on file in his note appended to the application of Mr. Surgett, I think it most likely it was filed on the 12th May, 1836, the same date of entry No. 3278, which will more fully appear in my answer to next interrogatory.

Answer to cross interrogatory 2d. I herewith annex a copy of the application of Francis Surget, on file in my office, to purchase the back lands claimed by him as a double concession to the front lots or fractional sections, as described in the 1st interrogatory in chief, as also a copy of the register's note appended thereto, giving his reasons for rejecting the application of Mr. Surgett; this document is marked B, which is made part of this answer. I am aware of no other evidence I can give that would be useful to the plaintiffs in this suit, except that I can find no evidence on file shewing that Mr. Surgett made a tender of payment for the lands claimed by him as designated in his said application.

(Signed) HENRY O. McENERY, *Register.*

Sworn to and subscribed before me, this 12th January, 1843.

(Signed) O. D. STILLMAN, *Justice Peace.*

STATE OF LOUISIANA, *parish of Ouachita:*

I, Oliver D. Stillman, a justice of the peace in and for the said parish and State, do hereby certify, that by virtue of the annexed commission, issued from the circuit court of the United States for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, I proceeded to the office of Henry O. McEnery, register of the land office, residing in the town of Monroe, who is a witness in a certain cause now pending in said court, wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant, and that said witness reduced to writing his several answers to the interrogatories hereto annexed, and sworn to and subscribed the same in my presence.

Given under my hand at my office, in the town of Monroe, this 12th day of January, 1843.

(Signed) O. D. STILLMAN, *J. of the Peace.*

A.

STATE OF LOUISIANA, *parish of Concordia, ss:*

Be it remembered that, on this tenth day of May, A. D. 1836, before me, William L. Poindexter, a notary public, in and for said parish, duly commissioned and sworn, personally came and appeared Dr. William Harriman, of the parish and State aforesaid, who, being duly

sworn, declared and said that he has examined and is well acquainted with the tract of land lying in the rear of lands belonging to Mr. Francis Surgett, in the parish aforesaid, belonging to Messrs. Edward Sparrow and Edward Whittlesey, being lots one and two of section 61, the whole of fractional section 60, southeast quarter of section 59, and the east half of the southwest quarter of section 59, and the northeast quarter of section 59, all in township five, of range nine, of lands in the district north of Red river; the said lands lie on a large bayou and water course known by the name of the Mill bayou; that they are fit for cultivation, and the greater part of them is above ordinary overflows, and covered with cane, and that the greater part of them is full as high, if not higher, than the land immediately in front.

(Signed) WM. HARRIMAN.

Sworn to and subscribed before me, this 10th May, A. D. 1836.

(Signed) W. L. POINDEXTER, *Not. Pub.*

LAND OFFICE AT OUACHITA,
State of Louisiana.

I, Henry O. McEnery, register of said land office, do hereby certify, that the above affidavit is a true copy of the original on file in my office.

Witness my hand this 12th day of January, A. D. 1843.

(Signed) HENRY O. McENERY, *Register.*

For application of F. Surgett, referred to in answer to 2d cross interrogatory, and marked "B," see page 36.

Testimony of G. L. C. Davis.

G. L. C Davis, being sworn, says, that he is acquainted with Capt. Surgett and the land in controversy, and also Mr. Lapice; he knows the plantation of F. Surgett, situated in the parish of Concordia, in front of the land in dispute; he was on the land in controversy in the fall of 1839; witness being a practical surveyor, F. Surgett told him of the controversy between himself and the plaintiffs, and requested him to go and examine it, and having visited his plantation he went back and examined the back concessions at the most southern portion, and found the general character of the land gradually recede back to a low swamp, and when he arrived at the extreme back part of the back concession, he found a low swamp, subject to an overflow of from 6 to 10 feet; he met, however, on the back concessions some small bayous or drains from the front lands; the banks of these drains were, however, higher than the lands on either sides, and the land appeared to recede from the banks of these drains, and on the banks of these drains he found, in several instances, narrow strips of cane growing; this is the character of the southern part, but, as he approached the northern part, he found quite a large dry bayou, 60 to 80 feet in width; there was no running water, but several pools of standing water; the banks of this bayou were pretty high, and covered with cane to a considerable extent on either side, and called Mill bayou; he went up the bayou as

far as its junction with the lake near his field, and found a levee across; without the levee, witness thinks that the bayou would have gradually filled up; the lake of which witness speaks has been filling up, and thinks that the bayou keeps pace in filling up; the bayou is nearly dry all the summer, and not navigable when the Mississippi is low, but might be navigable when the Mississippi would be very high, and no levee across except the lands on the skirts of the bayou spoken of; the land is generally low and swamp land.

The practice in United States surveying, when water courses were navigable, [is] to run off lots at right angles with the water course, giving them a depth of about 1½ mile; and where the water course was not navigable, no deviation was made from the square sectioning of the township. This is the custom in the northern part of Mississippi, and pervaded both Mississippi and Louisiana.

The Mill bayou spoken of for nine months in the year would be dry, without much water being in it, and resemble all the other drains along the Mississippi river, and the bayou is much larger than is necessary for draining a plantation; is acquainted with several bayous resembling this, but somewhat larger, and mention[s] Bullett bayou and bayou l'Argent.

Witness states, that all the water in Mill bayou is produced from rain and transpiration, and not from a spring nor from the river.

Cross examination.

Witness says, he thinks he first struck Mill bayou on or about the E. ½ of the S. W. qr. of section 59, or the S. E. qr. of section 59, on the south side of the bayou; he thinks the arable land extended about ¼ mile in *with* in cane; the general character of the land on these bayous is that the arable land widens as they approach the river; in travelling the line from A to B, drawn on the map, he passed through high cane land all the way; that he was not at either end of the bayou (Mill.) Witness thinks that ⅛ of lot No. 2, fractional section 60, is high arable land in cane; that he believes, from what he saw, that the S. ½ of lot No. 1, in fractional section 60, is high arable land in cane.

Ex. in chief.

Witness states that there was from 15 to 20 chains of arable land on each side of the bayou, that is, what he saw of it; *no* so much as the bayou goes back; that he was at a levee across the bayou, about ⅛ of a mile, he supposes, from its junction, a low place supposed to have formerly been the channel of the Mississippi. Witness says he never travelled the distance from said junction to the levee; this low place is a lake which has gradually filled up so much *so* that he walked over it dry when he was there; the levee across the bayou is on Mr. Surgett's plantation; that on the levee is continuous on Mr. Surgett's plantation, on the margin of the Mississippi, and did not notice the bed of the old river or lake near the Mississippi.

Taken in open court, February 24th, 1845.

For D. N. HENNEN, *Clerk.*

(Signed) J. Q. A. HOIT, *Dep. Clerk.*

LAPICE & WHITTLESY
vs.
F. SURGETT.

Evidence of O. Simpson.

THE STATE OF MISSISSIPPI,
County of Adams:

Personally appeared before me, Thomas Redman, a notary public, at my office, in the county aforesaid, the subscribing witness, who being duly sworn, says, that in the month of April, 1836, he surveyed the plantation owned by Francis Surgett, in the parish of Concordia, and State of Louisiana, fronting on the Mississippi river, opposite to Glasscock's Island, in townships Nos. 4 and 5, in range No. 9 east, and that he surveyed the "Back concessions" of the lots composing said plantation, so far as it was practicable, on account of the high water. And that respecting the lands in sections No. 59. 60, and 61, in township No. 5, of range No. 9 east, this witness has to state from his recollection, as well as from a fair copy of the field notes of the survey, that the lands in the above mentioned sections, immediately in the rear of the front lots, composing the said Francis Surgett's plantation, are of good quality, of the description called "high, dry, swamp, partly covered with cane, and much of the remainder in dry cane, seed cane, or grass which has succeeded to cane, which had died and decayed; that the lands are high, and showed banks from 12 to 8 feet high on the bayou near the back lines of the said Francis Surgett, gradually becoming lower, in proceeding from the river, till at the distance of from three quarters of a mile to a mile and a quarter, at which distance the land was overflowed when this witness was there, being in April, 1836; that on the "dry swamp," spicewood, mulberry, dewberry briers were growing; that in the opinion of this witness, there is no bayou in that neighborhood which is navigable; that the "Mill bayou," on which this witness understands that Edward Sparrow has made entries, and which is the principal bayou in the neighborhood, was about one chain wide at the surface of the water, with banks 8 to 12 feet high at the back line of Francis Surgett's plantation, and perhaps two chains wide from bank to bank; that said bayou was in several places fordable, and in other places perhaps ten feet deep, with logs across it in several places, on which this deponent crossed it. That this bayou emptied itself, at the time this deponent was there, in April, 1836, (at which time the river was very high, and breaking the levies on the plantation,) into a willow swamp covered with water, at the distance of about one hundred and thirteen chains from the back line of Francis Surgett's front lots, the water in the bayou being of the same level of the water in the swamp.

That this bayou formerly communicated with a lake about a mile from the Mississippi river, from which lake it is now separated by a levee; that the end of said lake, which is on Francis Surgett's plantation, does not communicate with the river; that the lake itself, when this

deponent saw it, is grown full of willows, and ought to be called a willow slough, and that it would be difficult to traverse it with a canoe on account of the willow bushes and fallen timber.

This deponent further states, that at the time when he was there, in April, 1836, the Mississippi was high, and that in the opinion of this deponent, there was none of the water of the Mississippi in said lake, bayou, or swamp, but that the water in them was entirely rain water, which had fallen inside of the levies; and this opinion was formed on account of the clearness and other appearances, whereby the rain water lying in the swamps may be distinguished from the Mississippi water.

NATCHEZ, 21*st December*, 1836.

(Signed) O. SIMPSON.

UNITED STATES OF AMERICA,
State of Mississippi, Adams county:

Personally appeared before me, T. Redman, notary public, duly commissioned and sworn, O. Simpson, and acknowledged the above to be his true and proper signature. Affirmed this 21st day of December, 1836, in the city of Natchez.

In testimony whereof, I have hereunto set my hand, and affixed my seal of office.

(Signed) T. REDMAN, *Not. pub.*

GENERAL LAND OFFICE, *September 25th*, 1839.

I hereby certify the foregoing to be a true copy taken from the original on file in this office.

In testimony whereof, I have hereunto signed my name, and caused the seal of the General Land Office to be affixed, on the day and date above written.

(Signed) JAMES WHITCOMB,
Commissioner of the General Land Office.

Interrogatories to be propounded to Peter Little and others.

IN THE UNITED STATES CIRCUIT COURT,
For the eastern district of Louisiana, New Orleans.

P. M. LAPICE & EDWARD WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

Interrogatories propounded to Peter Little, Jesse Grice, Thomas Gilbert, Nathaniel Grice, William Dix, and Benjamin F. Glasscock, residents of the parish of Concordia, in said State, whose answers will be read in evidence on the trial of the above cause on behalf of the plaintiffs.

Interrogatory 1st. Are you or are you not acquainted with the land in controversy, to wit, southeast quarter of section No. 59, lot No. 1, quarter of section No. 59, lot No. 1, quarter of section No. 61, lot No. 2, quarter of section No. 61, fractional section No. 60, northeast quarter

and east half of southwest quarter of section 59, west half of the southeast quarter, and the east half of the southwest quarter of section 58, all in township 5, range 9, of lands in the said parish? If yea, state how long you have known it, and if you have or have not examined it particularly.

2d. Is or is not a fair proportion of said land arable? And will or will not the said land, or a part of it, answer the description of good arable land, lying upon a bayou or water course?

3d. Please describe the said land as accurately as you can, how it lies, which parts are arable, and which are not; and also, the average depth of any bayou or water course running through said lands, if any there be, and its width at the measurement, and widest places. And is or is not the said land as good a tract as is usually to be found at the same distance from the Mississippi river?

Int. 4th. Was or was not almost every acre of land in the parish of Concordia covered by the water overflowed by the freshet of 1828; and were not a greater part of the lands lying over the Mississippi river adjoining the tract overflowed that year; and are or are not said lands considered as good and valuable as any in the parish?

5th. If the said land in controversy borders on a bayou or water course, state what is the name of said bayou, if it has a name; has or has not an embankment or levee been built across the said bayou on the margin of the Mississippi river; and was or was not said levee built by the defendant Surgett, in whole or in part, or at his instance, or by his consent; and did or did not a large body of water flow through said bayou for several months in the year, before said levee was built; and would it not be so still, if it was not for said levee?

6th. Is or is not the said levee on the margin of the river on defendant's front land, back of which part of the land in controversy lies?

7th. Have you or have you not heard the defendant, Surgett, claim the above described land as belonging to him? And have you or not heard him say, that the title of the plaintiff thereto was not good, and otherwise slander the same? If yea, do you not think he injured or lessened the value thereof to the plaintiffs, and prevented the land from *being* as high a price as it otherwise would? If yea, how much do you think he has damaged the plaintiffs by his said claim?

Int. 8th. Under this general interrogatory, please state any thing else you may know of advantage to the plaintiffs.

(Signed) STACY & SPARROW;
Attorneys for plaintiffs.

Cross interrogatories to be propounded to P. Little and others.

IN THE UNITED STATES CIRCUIT COURT,
Eastern district of Louisiana.

P. M. LAPICE & EDWARD WHITTLESY
vs.
FRANCIS SURGETT.

Cross interrogatories to be propounded to Peter Little, Jesse Grice,

Thomas Gilbert, Nathaniel Grice, William Dix, Benjamin F. Glasscock, on the part of the defendant.

Cross interrogatory 1st. Have you not already given your testimony in this case under a commission taken out by the defendant, Francis Surgett; and are you now of opinion that the testimony then given is incorrect in any respect or particular? If so, please state in what particular.

2d. Please state particularly the length of the bayou referred to in plaintiff's interrogatories, where it leads, and how it is supplied with water?

3d. Is the said Mill bayou a running stream during all the year, or merely a drain through which the water runs from the back water in the swamp towards the river Mississippi, when the river is high? Is it ever a running stream except during hard rains, or in high water of the river Mississippi; is it a navigable stream; if so, for how many months in the year?

Cross int. 4th. Do you not know that one of the plaintiffs, P. M. Lapice, has lands entered as back concessions by him in the parish of Concordia, on a bayou called Crooked bayou, in the rear of his Whitehall plantation, on the river Mississippi; and is not said Crooked bayou much larger than the one referred to as Mill bayou; and is not said Crooked bayou nearly six miles in length; and is not the water running in it during a much greater portion of the year than in Mill bayou? Please describe Crooked bayou particularly, and state exactly its position in reference to the front tract of Mr. Lapice.

5th. Is there not a general levee on the river Mississippi which prevents the flow of water from the river Mississippi to the rear of Mr. Nugent's plantation; and is it not true that the levee across Mill bayou has no effect in preventing the flow of water from the river?

6th. Please state any facts or matters within your knowledge material to the defendant to shew that the back concession claimed by him does not border on a river, creek, bayou, or water course, so as to prevent him from claiming his back concessions under the act of Congress, as fully and particularly as if interrogated thereto.

R. N. & A. N. OGDEN,
Attorneys for defendant.

The following commission issued on the 22d of January, 1844:

CIRCUIT COURT OF THE UNITED STATES,
For the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana:

To the parish judge of the parish of Concordia, or any justice of the peace of the parish of Concordia.

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you Peter Little, Jesse Grice, Thomas Gilbert, and others, and them duly examine on oath, touching and concerning cer-

tain matters and things in a case now depending in the said court, wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant; and the same examinations so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 22nd day of January, anno domini 1844, and the sixty-eighth year of the independence of the United States of America.

For D. N. HENNEN, *Clerk*.
J. Q. A. HOIT, *Deputy clerk*.

Answers to the foregoing interrogatories and cross interrogatories.

Deposition of Jesse Grice.

P. M. LAPICE & EDWARD WHITTLESY
vs.
FRANCIS SURGETT. } No. 872.

In the United States circuit court for the eastern district of Louisiana.

Jesse Grice, a witness, being duly sworn to give full and true answers to the questions:

Interrogatory 1. He saith, that he is acquainted with the land as described in this interrogatory, and has known it about fifteen years; and at one time examined it particularly.

Answer to interrogatory 2. That there is a fair proportion of said land arable; there is a bayou, called the Mill bayou, running through said land; and that the land in said tract lying on the bank of said bayou are all arable.

3rd. He saith, that that part of said land adjoining the plantation of Francis Surgett is cane land for about four hundred yards back, the balance of said land is high swamp, above ordinary overflow; Mill bayou on Surgett's land, at or near the dam, is seventy-four feet wide from bank to bank, and seventeen feet deep, and that is the general average of said bayou; and that said tract of land is as good as is usually to be found at the same distance from the Mississippi river in that part of the parish.

4th. He saith, that almost every acre of land in the parish of Concordia was covered with water during the overflow of 1828; and believes that all of the lands lying over the Mississippi river, adjoining this tract, overflowed that year; and that said lands are good and valuable as any unimproved back lands in that part of the parish.

5th. He saith, said land in controversy does border on a bayou, called Mill bayou; there has been an embankment or levee built across said bayou on the margin of the Mississippi river; and that the defendant, Surgett, built said levee or embankment principally at his own expense; there would a large body of water overflow through this bayou for several months in the year if it was not that there is a levee or embankment

across said bayou back from the river on the back of Surgett's plantation and the front levee, as above described.

Answer to interrogatory 6th. Witness answers, that said levee is on the margin of the river on defendant's front land, back of which part of the land in controversy lies.

7th. He saith, that he does not recollect of having heard the defendant say anything about plaintiff's title to said land.

8th. He saith that he knows of nothing further.

Answers to cross interrogatories.

1st. Witness answers, that he has never testified to any interrogatories in this case for either party previous to this time.

2nd. Witness answers, that the bayou is about two miles and a-half in length in a direct line, and that it branches into several branches, until it is lost in the lower swamp; it was formerly supplied by water from the Mississippi river, but since the levees have been made there is no water in the bayou except rain water, and back-water from the lower swamp.

3rd. Witness answers, that Mill bayou never was a running stream of water during the whole year; the water, before the levee was made, run from the Mississippi river to the swamp in high water; it never was a navigable stream only for a peroque or a skiff, and then only at high water in the Mississippi.

4th. Witness answers, that he knows nothing of what is contained in this interrogatory.

5th. Witness answers, that there is a general levee on the Mississippi river, which prevents the water from flowing back; knows nothing about J. M. Nugent's plantation; that the levee across Mill bayou prevents the water from the Mississippi river from flowing through said bayou.

Answer to cross interrogatory 6th. Witness says that he has given a full description of the bayou or water course through said land as far as he knows in the 2d cross interrogatory; and further this deponent saith not.

(Signed,) JESSE GUICE.

Sworn to, and subscribed before me, this 17th February, 1844

(Signed,) THOS. EDWARDS, *J. P.*

Deposition of Peter Little.

Peter Little being next duly sworn to give full and true answers to the questions:

Interrogatory 1st. Witness answers, that he is acquainted with the southeast quarter of section No. 59, lot No. 1, quarter of section No. 59, lot No. 1, quarter of section No. 61; that he is not acquainted with lot No. 2, quarter of section No. 61; that he is acquainted with fractional section No. 60, and the northeast quarter and east half of southwest quarter of section 59, and also the whole of section 58; and that there is no land in section 58 in controversy, as witness claims to be the

owner; that he has known said land from two to three years; and has examined fractional section 60, and a large portion of section 59.

2nd. Witness answers, that there is not a fair proportion of the land which witness is acquainted with arable; and that the land lying on a bayou or water course is good arable land.

3rd. Witness answers, that there is about two hundred acres of the land in controversy that is arable land; a portion of this land lies on Mill bayou; and that Mill bayou commences about three quarters of a mile from the river Mississippi, and it is about one mile and a-half from the head of the bayou to where it loses itself in the swamp; and the head of the bayou where the embankment is made is about 65 or 70 feet wide, and diminishes in width until it is lost; and about one mile back from the head, said bayou is not more than 20 or 30 feet wide, and about 7 feet deep; said bayou at the mouth is about 16 feet deep; and that there is cypress trees in places in said bayou, which are as large as the surrounding timber; and that the water of the head of said bayou was about 5 feet deep on the 7th day of February, 1844, and at the distance of about a mile from the head the water was not more than 12 or 15 inches deep; there is no water communication from this bayou to the river, and the character of the land between the head of this bayou and the river is grown up with timber, and a portion of it might be cultivated; and that the timber in the lowest part of said land is as large as that which grows on the highest land; and that said land is as good as is usually to be found at that distance from the Mississippi river.

Int. 4th. Witness answers, that almost every acre of land in this parish was overflowed that year, (1828;) and that a greater part of the lands lying on the Mississippi river, adjoining this tract, was overflowed that year; and that said lands in controversy *is* not as good as any front land, or any land in the parish, not an acre of it.

5th. Witness for the first part refers back to answer in 3d interrogatory, and witness says, he does not consider that Mill bayou extends to the Mississippi river; but if it was not for an embankment on the bank of the river, the water would run into Mill bayou at ordinary high water; and that said embankment or levee was built by the defendant, Surgett; said levee is a continuation of the general levee on the bank of the Mississippi river, and that in high water a pretty large body of water would flow through this bayou; and would do so now if it was not for said levee.

Int. 6th. Witness answers in the affirmative.

7th. Witness answers that he has heard Surgett claim the land, and that he believed that he would gain the suit; and that the plaintiff has offered to sell the land in controversy to witness frequently, and he would not buy it, as he did not want to buy a law suit; and he does not know that he would have bought it, even if there had been a good title to it; and cannot fix any amount of damages.

8th. Witness answers, that he knows nothing further that would be of any advantage to plaintiffs.

Answers to cross interrogatories.

Cross interrogatory 1st. Witness answers that he has, and if there is any variation it is owing to his late examination, since giving said testimony.

2nd. Witness answers, that he has answered this in the 3rd interrogatory, except that it is supplied by rain, and in high water by back water; and is not a running stream.

3rd. Witness answers, that said Mill bayou is not a running stream of water; merely a drain, through which the water runs from the back water in the swamp towards the river Mississippi; the time of high water, the water runs from the swamp towards the Mississippi river, in this bayou; and said bayou is not a navigable stream at any time.

4th. Witness answers, that he knows nothing in reference to interrogatory.

Answer to cross interrogatories.

Int. 5. Witness answers, that there is a general levee on the bank of the Mississippi river, which prevents the flow of water from said river back, and that the water is kept out of Mill bayou by the general levee on the margin of the river.

6. Witness answers, that there are bayous running through said land, and that said land does not border on any river or water course.

(Signed,) PETER LITTLE.

Sworn to and subscribed before me, this 17th February, 1844.

(Signed,) THOMAS EDWARDS, *J. P.*

Deposition of Joseph Froskoloske.

Joseph Froskoloske being next duly sworn to give full and true answers to the interrogatories:

Int. 1. Witness answers, that he is not acquainted with the land in controversy.

2nd. Witness answers, that he knows nothing about it.

3d. Witness answers, that he knows nothing about it; and the same to 4th, 5th, 6th, and 7th.

8th. Witness answers, that he has surveyed a bayou, called Mill bayou, as spoken of by Mr. Little, Guice; that Mill bayou commences about ¾ of a mile from the Mississippi river in a direct line; said bayou at the head, where it commences, is 69 feet from bank to bank, and 16 feet deep; that the width of the water in said bayou is 40 feet wide and 4½ feet deep; and at 14 chains the water is 30 feet wide and 3 feet deep; at this point the bayou forks, and this fork is as wide as Mill bayou, but not so deep, and runs through Mr. Surgett's field; at 30 chains, supposes the bayou is about 50 feet from bank to bank, and the water 25 feet wide, and four feet deep; at 40 chains the bayou is about 40 feet wide from bank to bank, and water in the said bayou 20 feet wide and 3 feet deep; at 62½ chains the bayou is about 20 feet wide, 10 feet water in width and two feet deep, and cypress timber growing in it of the largest size; at 65 chains, the bayou is 35 feet wide, and water 15 feet wide

and 3 feet deep; at 80 chains the bayou is about 8 feet wide, and water 6 feet wide and 8 inches deep; at 83¼ chains, the width of bayou is lost. There is a bayou running from the levee on the Mississippi river, which measures 25 chains in length, and about 40 feet wide from bank to bank, at the end nearest the river; and at the other end the bayou is about 8 feet wide, and for the balance of the distance to the 2nd levee or embankment there is no bayou.

To the cross interrogatories witness answers, that he has given full answers, so far as he knows, in the 8th interogatory.

(Signed,) J. FROSKOLOSKE.

Sworn to and subscribed before me, this 17th February, 1844.

(Signed,) THOS. EDWARDS, *J. of Peace.*

STATE OF LOUISIANA, *parish of Concordia.*

By virtue of the annexed commission, I have caused to come before me at my office, in the town of Vidalia, on the 17th day of February, 1844, Jesse Guice, Peter Little, and Joseph Froskoloske, witnesses in a certain cause now pending in the U. S. circuit court for the eastern district of La., New Orleans, wherein P. M. Lapice and Edw'd Whittlesey are plaintiffs, and Francis Surgett is defendant; and the said witnesses were duly sworn to tell the truth to the questions propounded to them in the said cause, and their answers were reduced to writing by me in their presence, and subscribed by them respectively in my presence. Witness my hand, this 17th day of February, A. D. 1844.

(Signed,) THOS. EDWARDS, *Justice of Peace.*

On the 4th day of December, 1841, the following commission was issued, to wit:

For interrogatories and cross interrogatories, see page 12.

Circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana.

To the parish judge of Concordia, or any other judge or justice of the peace of said parish.

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you Wm. Dix, Benjamin Glassock, James Crossgrove, John Griffis, and them duly examine on oath, touching and concerning certain matters and things in a cause now depending in said court, wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant; and the same examinations so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court, without delay, to be read in evidence on the trial of said cause; and send also this writ.

Witness, the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this 4th day of December, anno domini 1841, and the sixty-sixth year of the independence of the United States of America.

[L. S.] (Signed,) DUNCAN N. HENNEN, *Clerk.*

Depositions to the aforesaid interrogatories.

STATE OF LOUISIANA, *parish of Concordia.*

Be it remembered, that on this 9th day of February, A. D. 1842, by virtue of a commission to me directed from the honorable the circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, in the suit wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant, and which commission is hereto annexed, I, James Dunlap, parish judge of the parish of Concordia, La., have caused to come before me at my office, in Vidalia, the witnesses hereinafter named; and after the said witnesses were duly sworn, as the law directs, I, the said judge, propounded to them, severally, the interrogatories and cross interrogatories annexed to said commission, and they severally answered as follows:

Answers.

James Crossgrove sworn, answers to

Int. 1st. He answers, that he is acquainted with plaintiff Lapice, and defendant Surgett; does not know plaintiff Whittlesy; has been informed of the matter in controversy between the parties.

2nd. He answers in the affirmative.

3d. He answers, he is acquainted with the lands generally on Mill bayou, and particularly with the land said to have [been] entered by Sparrow and Whittlesy, on said bayou.

4th. He answers, there are several bayous heading or rising in defendant's plantation, and running back into the swamp; and among these is the bayou called the Mill bayou, which runs also through the lands claimed by Lapice and Whittlesy, the plaintiffs. To describe this bayou he says, the source or head of it was formerly a lake, partly on defendant's plantation, about half a mile from the Mississippi river; from this lake the said bayou runs out into the low swamp, where it emptied itself within two miles of the said lake; does not consider this bayou a navigable stream, but only a natural drain; it is a running stream during the rainy season; during the summer months and dry season, it does not run, though there are pools of water in places, whilst in other places it is entirely dry; it depends upon the rains and the stage of the river during what months and how long it is a running stream; when it is owing to the high water in the river, the bayou is supplied from the back water in the swamp, and runs towards the river; it is never a running stream in a dry season, and when the Mississippi is low the length of the bayou does not exceed two miles; witness' acquaintance with these things commenced in November, 1826, when he resided upon defendant's plantation; he left there in December, 1829; during his stay upon the place he has frequently seen the lake, as well as the bayou spoken of, perfectly dry; the lands of defendant run across the lake aforesaid.

Answer int. 5. He answers in the affirmative; the lands he refers to in his previous answers, *is* the same as represented on the map exhibited

to him as in the rear of sections 28, 29, 30, 31, 32, and 33, marked F. Surgett; the remainder of this interrogatory is answered in his answer to the 4th interrogatory, except as to the length and width of the lake, which he says was not, in 1829, when he last saw it, more than from 30 to 50 yards wide, and not exceeding two miles in length, during the rainy season; part of the time in the dry season, the lake was dry; it was never more than from 3 to 4 feet in depth, except during a general overflow.

Int. 6. He answers, he does not know, or recollect at present, of any bayous formed by drains from the bends of the Mississippi, upon which the front planters have entered back concessions, except the *Crooked* bayou, which runs in the rear of Mr. Lapice's Whitehall plantation, about 3 miles from Vidalia; has understood that Lapice has entered his back concession, or rear lands, through which this bayou runs; the said bayou, called *Crooked* bayou, is a much larger bayou and stream of water than the said *Mill* bayou, and contains running water nearly all the year; the *Crooked* bayou heads within the limits of the Whitehall plantation, and is about six miles in length, and empties into the *Big Cocodry*, a bayou which heads in lake Concordia, and empties into Black river.

7. He answers he knows nothing further.

Answers to cross interrogatories.

1st. He answers, that he understands the subject matter of controversy particularly to be the ownership of the lands, or portions of the same, in the rear of sections 28, 29, 30, 31, 32, and 33, in township 5, range 9 east.

2d. Has already answered, that the bayou is called and known by the name of Mill bayou; understood that there was a saw mill, or an attempt to erect one, on the bayou; never saw it; and whilst he was on defendant's plantation, from November 26 to December 29, there was no vestige of a mill on the bayou. There was a levee, in 1826, across the bayou, just below its junction with the lake referred to; does not know who built it; understood it was built by defendant's orders; it appeared then to be several years old. The land upon the bayou is generally arable land, secure from inundation, except in times of general overflow; cannot say what portion of the land in controversy is arable land.

Cross int. 3d. He answers, the levee across the bayou referred to has no effect in preventing the flow of water from the river, because of the general levee on the margin of the river; and for the same reason, the said bayou levee has no effect in preventing the flow of water into the river. The said bayou levee is about 30 to 40 feet in length, with a base of about 40 feet, and witness supposes the effect intended, in constructing it, was to prevent the water from flowing out of the lake into the low lands in the back part of defendant's plantation; but it has not had this effect, owing to other bayous leading from the lake, which had not been stopped or levied.

4th. The land in controversy being the back concessions of rear lots of the sections 28, 29, 30, 31, 32, and 33 aforesaid, or such portions of such rear lands as are claimed by the plaintiffs, and the said back concessions or rear lands, not being run out or surveyed, by the map exhibited to him, he cannot designate any lines which contain said rear lands; or the direction of the same from the front lots; or what entries, or portions of entries, by Sparrow and Whittlesy, would be included in such back concessions or rear lands; nor what portions lie above or below a direct line running at right angles from the river; thinks this might be ascertained only by a survey.

5th. He answers, he does not know any thing as to the back concessions, entered by Lapice on *Crooked* bayou, having been previously offered for sale by the United States, or previously entered by third persons. The land on Crooked bayou is about as good as that on Mill bayou.

Cross int. 6th. Knows nothing further favorable to plaintiffs.

(Signed) JAMES CROSSGROVE.

Sworn to and subscribed before me, this 9th day of February, A. D. 1842.

(Signed) JAMES DUNLAP, *Parish Judge*.

And afterwards, to wit, on this fifteenth day of February, A. D. 1842, I, the said judge, having caused the witness John Johnson to come before me, by virtue of the commission aforesaid, he was sworn as the law directs; and I, the said judge, read and propounded to him the interrogatories and cross interrogatories aforesaid, annexed to said commission, and he severally answered the same as follows:

Answers to interrogatories in chief.

Int. 1st. He answers, he knows the plaintiff Lapice, and the defendant Surgett; does not know Whittlesy, plaintiff; witness has been informed of the subject matter in controversy.

2d. He answers in the affirmative, and this acquaintance is of 15 or 20 years standing.

3d. He answers, he has been over all the lands in the rear of defendant's plantation, and upon the lands said to have been entered by Sparrow and Whittlesy, and marked in their names upon the township map exhibited to him by me, the said judge.

4th. He answers, there is a bayou called Mill bayou running through the lands in the rear of defendant's plantation; witness has known this bayou since 1822; this bayou runs through the lands represented on the map exhibited to him as those entered by Sparrow and Whittlesy; the bayou has its source in a lake on defendant's plantation, at a point about ¾ of a mile from the river; it runs back into the swamp, where it empties itself about three-fourths of a mile from its source; does not consider it a navigable stream at any time, unless a stream be considered navigable when it will bear a skiff or canoe, which vessels witness had

on it during the freshet in 1828; this bayou is dry nearly at all seasons, except during high water or heavy rains.

Int. 5th. He answers in the affirmative, that the lands he refers to, as the lands said to have been entered by Sparrow and Whittlesy, as exhibited by said map, are in the rear of sections 28, 29, 30, 31, 32, and 33, according to said map, and the personal knowledge of this affiant of the plantation of F. Surgett, and of the lands in the rear of the same; as to the outlet referred to, witness describes it as the lower end of the lake previously referred to; it is about ¾ of a mile in length from the mouth of the bayou where it connects with the lake; this outlet has now timber growing on it, and is nearly dry, having an occasional pool of water in it after rains; it has been, and is still, by some, called Mill bayou; it is not a running stream at any time, but there is tillable land in it in places. To describe the lake represented on the map, of which the outlet just described is a part, he says, it is a low flat place or *slue*, not perhaps exceeding two miles in length, generally dry during the summer and fall months; does not consider it a *lake* since 1828, when it was filled with water by the river; since that year, it has been geneally dry, except during or after heavy rains.

Int. 6th. He answers, that he does not know of any bayous similar to defendant's Mill bayou, upon which to institute the comparison asked for.

7th. Knows nothing further.

Answers to cross interrogatories.

Cross int. 1st. He answers, that he understands the subject matter of controversy to be, particularly, the ownership of the lands, or portions of the same, in the rear of sections 28, 29, 30, 31, 32, and 33, in township No. 5, of range No. 9 east.

2d. He answers, there is a bayou, and it is called Mill bayou; understood there was a saw-mill commenced there, but never finished; witness saw what he supposed to be some of the timbers of it; there is a levee across the bayou, at or near its junction with what has been called the *lake* or *slue;* this levee was built by defendant; part of the land upon the bayou is arable, cannot say how much; part of the land is secure from inundation, except when the Mississippi overflows, cannot say how much; cannot say what portion of the land on the bayou is arable.

3d. He answers, there has been a levy built, as previously stated, across the bayou; this levee was built in 1823; witness saw the work while progressing. In consequence of the general levee, on the margin of the river, this bayou levee has no effect, at any time of the year, in preventing the flow of water from or to the river; were it not for this general levee, however, when the Mississippi is very high, the water would flow down the bayou, the bayou levee being removed. The levee is about 30 or 40 feet long, with a base of about 30 feet; as to the effect of the levee, witness thinks it has had little or no effect, and considers the labor uselessly expended upon it.

Cross interrogatory 4th. Witness answers, that having read the answer of the witness, James Crossgrove, to this 4th cross interrogatory, he adopts and makes the same answer as made by the said witness, Crossgrove, and made part of this examination.

5th. He says he has answered that he knows nothing.

6th. He says he knows nothing further.

(Signed,) JOHN JOHNSON.

Sworn to and subscribed by John Johnson, before me, this 15th February, A. D. 1842.

(Signed,) JAMES DUNLAP, *Parish Judge.*

And afterwards, on this 23rd day of February, A. D. 1842, at my office in Vidalia, personally came and appeared the witness, William Dix, who being by me first duly sworn, I, the said judge, propounded to the said witness the interrogatories and cross interrogatories annexed to said commission, and he severally answered the same as follows:

Answers of William Dix.

Int. 1st. He answers, he is acquainted with the plaintiff, Lapice, and the defendant, Surgett; does not know the plaintiff, Whittlesy; is acquainted with the subject matter of the controversy in the suit.

2d. He answers in the affirmative.

3d. He answers in the affirmative; and that he has a general knowledge of those lands.

4th. He answers, there are several bayous in the neighborhood, and a bayou called Mill bayou, which runs through the lands in the rear of defendant's plantation, said to have been entered by Sparrow and Whittlesey; it is not exceeding a mile and a half in length; is not navigable at any season; it is not running a stream, except after rains, when it serves as a drain; is never a running stream during a dry season; it had its source in a lake or *slue* on the defendant's plantation.

Int. 5. He answers, after examining the map referred to, that the lands he refers to are there in the rear of the sections mentioned in the interrogatory. For description of what is called the lake, he says it is a low flat place, about two miles in length, about 40 yards wide, and about four feet deep when filled with water; it is now generally dry throughout the season, having water in it only during a wet season. What is termed the outlet, or that portion of the lake or *slue* between the junction of the bayou and the levee on the river, was formerly the receptacle of water, both from rains and from the river; is now, however, dry and filled up nearly with trees and brush growing in it, and parts of it are susceptible of cultivation; it is on defendant's land; it has been called Mill bayou.

6th. He answers, he does not recollect of any such cases.

7th. He answers, that he knows or recollects nothing further material to the defendant.

Answers to cross interrogatories.

Cross int. 1st. He answers, he understands the subject matter in con-

troversy to be the ownership of the lands in the rear of the defendant's plantation.

2d. He answers, the bayou is called Mill bayou; does not know any thing about the saw-mill, except from hearsay; a levee has been constructed by defendant across the bayou near its source; the lands upon the bayou are generally arable, except during high water. Some of those lands are within defendant's plantation, and in cultivation; does not know what portion of the lands in controversy are arable lands.

Cross int. 3d. He answers, the bayou levee has no effect in preventing the water from flowing from or to the river, because of the general levee on the margin of the river; the levee is about 30 feet in length, its base about the same, and about ten feet high from the bottom of the bayou.

4th. He answers, he is unable to say, but thinks a survey would be necessary to ascertain.

5th. He has already answered.

6th. He answers, he knows nothing further material to the plaintiff.

(Signed,) W. DIX.

Sworn to and subscribed before me, this 23rd day of February, 1842, by William Dix.

(Signed,) JAMES DUNLAP, *Parish Judge*.

And now, on this 25th day of February, came the said defendant, Surgett, and represents that he cannot at present obtain the attendance of the witness, Benjamin F. Glasscock; and being desirous of forwarding this testimony, together with the testimony of , this examination is kept open for the purpose of procuring said testimony.

And now, on this 5th day of March, A. D. 1842, personally came the defendant, and offered for examination the witnesses, Benjamin F. Glasscock and Peter Little, and the said witnesses having been by me first duly sworn, I, the said judge, propounded to them severally the interrogatories and cross interrogatories aforesaid, and they severally answered the same as follows:

Answer of B. F. Glasscock.

Int. 1st. He answers in the affirmative.

2d. He answers in the affirmative; has been acquainted with the neighborhood for 30 years, and with the lands in the rear of defendant's plantation for about 14 years.

3rd. He answers in the affirmative.

4th. He answers, there are several bayous in the rear of defendant's plantation; the lands entered by Sparrow and Whitlesy do not front upon any bayou or bayous; there are several bayous running through the said lands, one of which is called Mill bayou; it is not navigable, nor is it a running stream, except when the Mississippi river is very high, when the water from the swamp runs up the bayou to the levee near the lake; and when the river falls, the water runs back down the bayou to the swamp; the source witness considers therefore at both ends of the bayou at different times. One end of this bayou is at the

levee near the lake, (or what is so put down in the map as a lake,) and the other end is in the swamp in the rear of defendant's plantation; its length is about one mile and a quarter; there are other bayous running through the same lands, larger and longer than the Mill bayou, which are not marked upon the map except as small bayous.

5th. He answers in the affirmative, as to the first part of this interrogatory; and for description of what is termed the lake and outlet referred to, he says that is represented in the map referred to, as a lake is now a slue grown up with timber; is about a mile and a half long, about 60 yards wide, and about two feet deep in 1840, during the high water. This slue is generally dry during the dry season, excepting a few pools of water in places; what is termed the outlet upon the map, was formerly the lower end of the lake or slue referred to, but it is now grown up with timber, and is susceptible, the most of it, of cultivation. It was called the Mill bayou; it is never a running stream, and seldom has water in it, except the lower end, where there is always a small pond.

Interrogatory 6th. He answers, he does not know of any such cases.

7th. He answers, he knows nothing further.

Answers to cross interrogatories.

Cross interrogatory 1st. He answers, he understands the matter in controversy particularly to be the ownership of the lands in the rear of the lots composing the defendant's plantation as set forth on the map ("A")

2d. He answers, that the bayou, as before said, is called Mill bayou; knows nothing about the saw mill; understood, however, there had been an attempt to build one, from which circumstance the bayou took its name; the bayou has a levee built across it, near its junction, until what is called the lake was built in 1823 or '4, by defendant's order; there is arable land on the bayou, though it is not all arable, a portion of it being overflowed every year; the most of the land in controversy was overflowed in 1840, and a portion of it is overflowed every year. Witness does not consider that there is more than 200 acres of the land in controversy which is good arable land; witness resided immediately adjoining the lands in controversy, from 1832 to 1840, and during that period he has *hunted* over them during all seasons.

Cross interrogatory 3d. Answers, the said bayou levee has no effect in preventing the water from flowing from or to the river by the bayou; witness does not know that the levee has had any effect; considers it was a useless labor. The levee is about 30 to 40 feet in length, with a base of 20 to 30 feet.

4th. He answers, that he is unable to answer the questions contained in this interrogatory satisfactorily, for want of a survey of the back concession claimed by plaintiff, no survey of the same being shown upon the map referred to.

5th. He answers, he knows nothing.

6th. He answers, that he knows nothing further.

(Signed) B. F. GLASSCOCK.

Sworn to and subscribed before me,
(Signed) JAMES DUNLAP,
P. judge.

Testimony of Peter Little.

Witness states, that being present at the examination of Mr. Glasscock, and having heard his answers read, he says that he considers and adopts for his own the answers of Mr. Glasscock to all the interrogatories and cross interrogatories, except the following interrogatories and cross interrogatories, to which the witness answers separately, as follows.

Interrogatory 2d. He answers, he has a partial acquaintance.

4th. He adopts the answer of Mr. Glasscock, except as to the length of the Mill bayou, and the comparative size and length of other bayous in the neighborhood with the Mill bayou; as to which matters witness says he does not know.

Interrogatory 5th. He adops the answer of Mr. Glasscock, except as to the depth of the lake in 1840, which he does not know, not being there in that year, but knows the lake or slue was nearly dry in 1841.

Cross interrogatories.

Cross interrogatory 2d. He answers, that the bayou is called Mill bayou; understood an attempt was made to build a mill on it more than thirty years ago; there was a levee built across the bayou; understood it was by defendant's order; there is arable land on the bayou both sides, but cannot say what portion of the land in contest is arable, never having been there in very high water; supposes, however, there is 2 or 300 acres.

3d. He answers, the bayou levee has no such effect now; does not know what effect it may have had; it is about 60 feet long upon the top, with about 30 feet base in the bayou.

(Signed) PETER LITTLE.

Sworn to and subscribed before me,
(Signed) JAMES DUNLAP,
Parish judge.

And having closed this examination of witnesses as set forth and contained in the foregoing pages, numbered from one to sixteen inclusive, I, the said judge and commissioner, have made this process verbal of the same, and do hereby certify the same to contain the true answers of the said witnesses to the interrogatories and cross interrogatories propounded to them by virtue of the annexed commission.

Witness my hand and seal of office, this 5th day of March, 1842, [L. S.] having no private seal.

(Signed) JAMES DUNLAP,
Parish judge.

And on the 28th day of January, 1843, the following commission was issued, to wit:

Circuit court of the United States, for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana. To any judge or justice of the peace in the parish of Concordia.

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you, that you call and cause to come before you, Peter Little, Jesse Guice, Thomas Gilbert, Nathaniel Guice, William Dix, Benjamin F. Glasscock, and others, residents of the parish of Concordia, and them duly examine on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant; and the same examination, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court on or before the 18th February next, to be read in evidence on the trial of said cause; and send also this writ.

Witness, the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of New Orleans, this twenty-eighth day of January, anno domini 1843, and the sixty-seventh year of the independence of the United States of America.

D. N. HENNEN, *Clerk*

[L. S.] (Signed) By H. P. PAGE, *Deputy clerk*.

[For interrogatories and cross do., see page 49.]

STATE OF LOUISIANA, *parish of Concordia, ss:*

Be it remembered, that on this 13th day of March, A. D. 1843, by virtue of a commission to me directed from the honorable the circuit court of the United States for the ninth judicial circuit, holding sessions in and for the eastern district of Louisiana, in the suit wherein Lapice and Whittlesy are plaintiffs, and Francis Surgett is defendant, and which commission is hereto annexed, I, George C. McWhorter, parish judge of the parish of Concordia, Louisiana, have caused to come before me at my office, in Vidalia, the witnesses hereinafter named; and after the said witnesses were duly sworn as the law directs, I, the said judge, propounded to them, personally, the interrogatories and cross interrogatories annexed to said commission, and they severally answer as follows:

Nathaniel Guice, sworn, answers to interrogatory 1st: States that he knows the land that did belong to Whittlesy and Sparrow, but that he has not examined the lines particularly, and that he has been acquainted with the land for six or seven years.

Interrogatory 2d. He answers, that he believes that a good and fair proportion of said land to be arable.

3d. He answers, that the land does not front on the river Mississippi, but that it lies back of a tract of land that lies on the river, owned by Mr. Surgett; that the land lies on Mill bayou on both sides. Witness cannot state what is the width or depth of the bayou; says that the land he considers as good as land usually is lying the same distance from the river.

4th. States that he did not live in the parish until thirty-three; the lands fronting on the river are as good as any in the parish.

5th. Answers, that the land in controversy borders on Mill bayou; states there is an embankment across the bayou at its mouth, but does not know who threw up the embankment; the embankment is not more than fifty or sixty yards from the river; states that before the levee was built, that a large quantity of water did flow through said bayou, for that he has had to swim it himself for a portion of the year; states that were it not for the levee the water would pass through as usual.

6th. Cannot answer.

7th. Never heard the defendant say any thing about it.

8th. Knows nothing further.

(Signed) NATHL. GUICE.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Signed) GEO. C. McWHORTER,
P. judge.

Answers to cross interrogatories.

Cross int. 1st. He states that he never was examined before in the case.

2d. States that the bayou mouths in the Mississippi and terminates in the low swamp; in time of high water it is supplied with water from the back water.

3d. Cannot answer any of questions.

4th. Does not know any thing about it.

5th. There is a general levee along the bank of the river Mississippi, which prevents the flow of the water from the river to the rear of Mr. Surgett's plantation; the embankment across the bayou is part of this general levee, and prevents the flow of the water down the bayou. States that, where this bayou runs out of a lake, there is another embankment across it; this last embankment is about a mile orthree-fourths of a mile from the river, between the two embankments; the grotte is principally willow, and part of the canal is tillable and part in cultivation, along the course of this bayou, or what has been formerly a bayou.

6th. States that he does not consider it as lying on any other water course than Mill bayou; knows nothing further.

(Sig'd) NATHL. GUICE.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Sig'd) GEO. C. McWHORTER, *P. judge.*

Mr. Thomas Gilbert, being sworn to the first interrogatory, states:

1st. States that he does not know the lines, but that he has been over the land; has seen one of the corners, and traced the west line about three-quarters of a mile; thinks that he has been pretty well over the whole of the land, but that he has not examined it particularly.

Int. 2d. Answers, that there is a good portion of the land covered with cane, and a good deal of swamp land among it; states that the

land lies on both sides of the Mill bayou, and that a fair proportion of it answers the description of good arable land.

3d. Answers, that it lies back of Mr. Surgett's; the land nearest the bayou is the highest land.

At the second embankment the bayou is seventeen feet deep and eighty feet wide, according to a measurement in which witness assisted; this is about three-quarters of a mile from the river. About a mile and a half further out from the river witness measured it again, and it was eleven feet deep and forty feet wide; the tract is as good as any tract of land lying that distance from the river that he knows of.

4th. That the land was all overflowed in the parish of Concordia that year, as far as witness knows; thinks the lands adjoining this tract, in front of said tract, were all overflowed; that the said front lands are considered as good and as valuable as any in the parish.

5th. Answers, that the land borders on Mill bayou; that an embankment has been thrown up across the mouth of said bayou, at the Mississippi river; does not know who built the levee; thinks it is on Mr. Surgett's land; from the size of the bayou thinks that there was a laige quantity of water that flowed down the bayou before the embankment was made, and would still were it not for said levee.

Int. 6th. Answers, yes.

7th. Answers, no.

8th. Knows nothing further.

(Sig'd) THOS. GILBERT.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Sig'd) GEO. C. McWHORTER, *P. judge.*

Answers to cross interrogatories.

Cross int. 1st. That he has never been examined before.

2d. States that it heads on the Mississippi; does not know its length, has never been out on it more than from two miles to two and a half; before the levee was built it was supplied from the river, but now from the back water from the swamp.

3d. States that since the levee was made he considers it merely a drain, and it is full only from back water in time of high water; witness states that he does not consider it a navigable stream, but considers it a water course, but it does not hold water all the year. States that during very high waters of the river, before the levee was built, there must have been water enough in it to have floated a small steamboat; that, upon a portion of the land in controversy, there was water enough to float a small steamboat; thinks that the bayou is pretty equal in its breadth and depth, only growing narrower and shallower as it recedes from the river.

4th. Does not know whether or not he, Lapice, has entered his back concession, but that he knows the Crooked bayou, and it is a small stream, not one-fourth as large as Mill bayou; knows nothing of the length; there is water running in it the greater portion of the year, but it is rain water; it is a small crooked bayou, running through the swamp.

Cross int. 5th. There is a general levee along the Mississippi that prevents the water from flowing from the river to the rear of Mr. Surgett's plantation. States that the general levee prevents the water from the Mississippi from running to the rear of Mr. Surgett's plantation. Witness states that the embankment, at which he measured the depth of the bayou, was about a mile from the river; between the general levee, on the margin of the river, and the embankment at which the measurement was made, the bayou is grown up with timber. States that the general levee on the river runs across the mouth of the bayou and stops it up, and prevents the water from the river from flowing down the bayou.

6th. Answers that he does not know of any other water course except Mill bayou.

(Sig'd) THOS. GILBERT.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Sig'd) GEO. C. McWHORTER, *Parish judge.*

Peter Little, sworn, states to interrogatory 1st. That he is acquainted with a small portion of the land in controversy; that he is well acquainted with that portion that lies north of Mill bayou, and that a very small portion of it lies north of the bayou; that he has known it about 3 years, and has examined that part north of Mill bayou particularly; that he lives adjoining the land.

2d. That part of the land lying west of the front land on the north of Mill bayou is good land for a half mile back; states that there is not more than forty acres of good land in controversy on the north side of the bayou.

Int. 3d. States that for a half mile back the land is good, the balance low; not well acquainted with the whole tract; supposes that 150 or 200 acres are arable, adjoining the back line of the front land, the good land generally bordering on the bayous. There are several bayous, one very nearly as large as Mill bayou, which heads in Capt. Surgett's field, about $\frac{3}{4}$ or $\frac{1}{2}$ mile from the mouth of Mill bayou. Witness was present with and assisted Mr. Gilbert in measuring the depth and width of the bayou in two places, and concurs in the statement of the same given by Mr. Gilbert; there are two or more bayous beside Mill bayou running through said land.

4th. Witness states that most of the land in the parish was overflowed by the freshet of 1828, the lands in front of said tract were likewise overflowed in that year; said front lands are supposed as valuable as any in the parish.

5th. Witness states that there is Mill bayou and other bayous running through the land, Mill bayou the most considerable. States that there is no embankment across the bayou at the river; the bayou does not extend to the river by $\frac{1}{2}$ a mile; the bayou comes out of the lake; what the witnesses have called the bayou, between the Mississippi and the lake, the witness considers to have been the former bed of the Mississippi; a large quantity of water flowed through the bayou from the

river back before the front levee was made, and would do so still were it not for the levee, but it would do so only in high water; it would do so when the river was within 6 or 8 feet of the top of the bank.

6th. Answers, yes.

Int. 7th. States that he has heard Mr. Surgett claim the land.

8th. States he knows nothing further.

(Sig'd) PETER LITTLE.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Sig'd) GEO. C. McWHORTER, *P. judge.*

Answers to cross interrogatories.

Cross int. 1st Answers that he thinks that he told the truth as far as he believed at the time.

2d. Witness states that the bayou heads about, or upwards of, ¾ of a mile from the river, and mouths in the lake, across which is a levee, which the other witnesses called the 2d embankment; states that between the general embankment, or levee on the river, and 2d embankment, referred to by the other witnesses, what they call a bayou, he knows is arable land, and can be cultivated any year, unless there is a general overflow; that it is overspread by trees, some of which are two feet through.

3d. Answers, that the bayou is not a running stream, it is not a navigable stream.

4th. Answers, that he knows nothing about it.

5th. Answer to the 1st part of the question is yes; to the last paragraph he answers, that it has no effect at all, for the water cannot get to it, being excluded by the general levee in front.

6th. Answers, he knows nothing further.

(Sig'd) PETER LITTLE.

Sworn to and subscribed, this 13th March, A. D. 1843.

(Sig'd) GEO. C. McWHORTER, *P. judge.*

And having closed this examination of witnesses, as set forth and contained in the foregoing pages, No. from 1 to 9, inclusive, and the said judge and commissioner have made this process verbal of the same, and do hereby certify the same to contain the true answers of the said witnesses to the interrogatories and cross interrogatories propounded to them by virtue of the annexed commission.

Witness my hand and seal of office, this 13th March, 1843, having no private seal.

(Sig'd) GEO. C. McWHORTER, *P. judge.*

Deposition of Caleb G. Forshey.

Caleb G. Forshey being sworn, saith, that he is a deputy U. [S.] surveyor, and is acquainted with the manner in which public lands are surveyed; the practice of surveying now under the U. S. Government is, to survey in square sections, whether the stream upon which the land lay is navigable or not; this is chiefly the practice; that the lands on

Black river, Tensas, and bayou Maçon, are surveyed in square sections, without regard of laying off the land to front these streams, notwithstanding these streams are navigable, and much larger than those streams on which lands were formerly surveyed to front; that, in many instances, lands were formerly surveyed to front on streams not actually navigable, (such as the Roundaway bayou in Madison parish,) and that the surveyor being instructed to return as navigable streams of a certain width, (witness thinks two chains wide, but is not certain,) without regard to their being actually navigable, and to return the quantities of land remaining after deducting the areas of the streams; that the surveys which he speaks of on Black river and Tensas were made principally from 1835 to 1841; that there is a large levee across the lake or Mill bayou, where it unites with the Mississippi on lot No. 31, as described in township map marked (A.)

Cross examined.

That he has known of the existence of the levee above referred to for the last 3 or 4 years, that is, ever since he has been acquainted with the place from personal observation.

That he has only held an appointment as deputy surveyor for one year, though he has been acquainted with surveying for many years; that the instructions he speaks of were from the surveyor general to his deputies.

That he has never known a dry bayou, without water in it for 9 months in the year, surveyed as water; witness does not know of any such bayous; as a practical surveyor he has never surveyed a water course as water, and deducted it from the area of the survey, unless it contained flowing water the whole year; this is not applicable to the topography of the country in which the land in dispute is situated.

Ex. in chief.

That none of the bayous in that part of the country are dry bayous, except at certain periods of the year; that bayous very large and capable of floating largest kind of vessels at portions of the year, are dry at other portions of the year, and are yet returned as navigable streams by the surveyor; for instance, Cocodra bayou, in Concordia parish, is returned as a navigable stream up to a certain township line, in which township it is not returned as navigable, though above that township the same stream is returned as navigable, though not larger above than below; this bayou is sometimes dry in places, though rarely, or very nearly dry.

That prior to 1840, Jesse Guice had been parish surveyor of the parish of Concordia.

Cross examined.

Bayou Cocodra is 50 or 60 miles in length, and witness has never seen it perfectly dry at any place; at the mouth, where it comes out of lake Concordia, it ranges from 3 to 40 feet deep, according to the season of the year; witness has travelled down this bayou 25 miles in a

skiff at extreme high water; his knowledge as to its being dry in places at certain seasons of the year, is from common rumor.

That at the mouth, the impression of witness is, that it is never dry during the whole year, but does not know.

Ex in chief.

Onha. Has known an instance when a back concession has been allowed to be entered, when the surveys is square.

Taken in open court, February 25th, 1845.

Abstract from the register of certificate's purchase, issued at the land office at Ouachita, Louisiana, (offered in evidence and marked M.)

Date of Certificate.	No. of Certificate.	Name.	Residence.	Tract purchased.			Quantity.		Rate per acre.		Amt. of purchase money.	
				Section or part of.	Township.	Range.	Acres.	100dths.	Dollars.	Cents.	Dollars.	Cents.
1829. November 21st.	138	Francis Surgett.	Mississippi State.	Lots 28, 29, 30, 31, 32, 33, 34 & 35	5	9 E.	1308	07	1	25	1635	08¾

Surgett vs. Lapice et al.

33/53

Land Office at Ouachita, Louisiana.

I, Henry O. McEnery, register of the land office at Ouachita, Louisiana, do hereby certify, that the above abstract from the register of certificates of purchase, Vol. 1st, page 5, is a true and correct copy of the record of the certificate No. 138, issued on 21st November, 1829, to Francis Surgett, of the State of Mississippi, for the lots 28, 29, 30, 31, 32, 33, 34, and 35, in township No. 5, of range No. 9 east.

In testimony whereof, I have hereunto subscribed my name, and affixed my private seal of office, (having no public seal,) on this the third day of March, A. D. 1845.

[SEAL.]

(Signed) HENRY O. McENERY, *Register.*

Certificate of McEnery, register, marked "N."

No. 138. *Land Office at Ouachita, Louisiana, 21st November*, 1829.

On this day sold to Francis Surgett, lots 28, 29, 30, 31, 32, 33, 34, and 35, township No. 5, of range No. 9 east, containing, according to the returns of the surveyor general, 1308 $\frac{7}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, for the entire purchase money for which lot, amounting to $1635 08$\frac{3}{4}$, the said Francis Surgett has produced to me the receipt of the receiver of public moneys, numbered one hundred and thirty-eight.

Land Office at Ouachita, Louisiana.

I, Henry O. McEnery, register of the land office at Ouachita, Louisiana, do hereby certify, that the above is a true and correct copy of the original entry made in the sales book in this office.

In witness whereof, I have hereunto subscribed my name, and affixed my private seal of office, (having no public one,) on this the 3d day of March, A. D. 1845.

[SEAL.]

(Signed) HENRY O. McENERY, *Register.*

Testimony closed.

And on the 24th of February, 1845, the following bill of exceptions was filed, to wit:

LAPICE & WHITTLESY
vs.
FRANCIS SURGETT.

Circuit court.

The court having rejected the certificate of the register of the land office at Ouachita, that defendant had purchased his front tract on the 21st day of November, 1829, on the ground that it was the certificate of a fact, and not a certified copy of the entries in his books, the counsel of the defendant moved the court to continue the cause until the certified copy of extracts from his sales book could be obtained; but which continuance the court, after argument, refused, and overruled the motion on the grounds—

1st. That the trial of the cause was commenced at the express solicitation of the counsel for the defendant.

2dly. Because it is unusual and improper for the court to grant a continuance after the trial has commenced against the consent of one of the parties.

3dly. Because the applicant for a continuance can claim the right now demanded, upon an application for a new trial; and to the refusal of the court to grant the continuance, the counsel for defendant tendered this bill of exceptions, which was signed.

(Signed) THEO. H. McCALEB, [SEAL.]
U. S. Judge.

And on the 25th of February, 1845, the following bill of exceptions was filed, to wit:

LAPICE & WHITTLESY
vs.
F. SURGETT.

In the United States circuit court, eastern district of Louisiana:

Be it remembered that, on the trial of this cause the defendant, F. Surgett, offered in evidence the annexed plan or diagram from the surveyor general's office, marked (,) delineating the form in which the back concession of defendant's front tract was directed by the surveyor general to be surveyed, and written directions under the signature of the surveyor general, dated Donaldsonville, April 29th, 1836, requiring the survey to be made in conformity therewith; to the introduction of which evidence the plaintiff's counsel objected on the following grounds:

That it did not appear whether said diagram was an original paper or document from the land office, or a copy.

If an original paper, it belonged to the land office. If a copy, it was not certified as such; and if an original, it was not shown how it came to the possession of defendant.

The signature of the surveyor general to said document was admitted, and that he was then surveyor general.

And further, that the document offered appeared to be entirely exparte, of the existence or knowledge of which the plaintiffs were strangers, and therefore cannot operate as legal evidence against them.

And the court having sustained the objection, and rejected the document offered in evidence, this bill of exceptions was tendered and signed as matter of record in the case.

(Sig'd) THEO. H. McCALEB, [SEAL.]
U. S. Judge.

For diagram, referred to in this bill of exceptions, see one marked B.

And on the same day, to wit, the 25th of February, 1845, the following bill of exceptions was filed:

In the United States circuit court, eastern district of Louisiana:

LAPICE & WHITTLESY
vs. } No. 872.
F. SURGETT.

Be it remembered, that, on the trial of this cause, the counsel for defendant, F. Surgett, offered in evidence the annexed document, certified by T. D. Newcomb, surveyor general, Louisiana, dated the eleventh day of April, one thousand eight hundred and forty-two, being certified to be a true sketch from township five, range nine east, of district north of Red river, representing the sections and claims from twenty-seven to thirty-seven, together with the public lands back of and adjacent thereto; to the introduction of which the plaintiffs' counsel objected, on the following grounds:

That the certificate of Newcomb, the surveyor general, as to his legal opinion, is not evidence; but that the map, as a sketch of survey, was admissible, being certified as a true sketch by the proper officer.

And the court having sustained the objections, rejected the evidence, this bill of exceptions was tendered and signed, to serve as matter of record in the case.

The court was, however, willing to admit the same as a true sketch, but the counsel for defendant declined offering it for that purpose alone.

(Sig'd) THEO. H. McCALEB, *U. S. Judge.* [SEAL.]

For diagram, referred to in this bill of exceptions, see one marked C.

[For maps, see original.]

Judge's reasons.

LAPICE & WHITTLESEY
vs. } Circuit court U. S.
FRANCIS SURGET.

The plaintiffs represent, in their petition, that they are the equal and undivided owners and possessors of certain tracts of land in the parish of Concordia, containing, in the aggregate, one thousand and fifty-four $\frac{63}{100}$ acres, the same having been purchased from the United States by one of the petitioners and Edward Sparrow, who transferred his right, title, and interest, to the other petitioner (Lapice) on the 28th of February, 1840. They further represent, that Francis Surget, of Adams county, Mississippi, has, at various times, and on divers occasions, slandered their title to the land in question, alleging that he, and not the plaintiffs, *are* the true and rightful owners thereof. They then pray that a curator *ad hoc* be appointed to represent said Surgett, provided service of process cannot be made personally upon him, and that he be ordered to appear and set forth his title to the tracts of land described in the petition. The action was originally brought in the district court of the ninth judicial district of the State, and subsequently transferred to this court.

The defendant appeared, and, for answer, denied that the plaintiffs

have any title to the land claimed by him. He alleges that he is the proprietor of the lands fronting on the river Mississippi. That the act of Congress, approved 15th June, 1832, entitled him to a preference in becoming the purchaser of any vacant land adjacent to and back of his own land, not exceeding forty arpents, French measure, in depth, nor in quantity of land that was contained in his front tract.

That a subsequent act of Congress, approved 24th February, 1835, supplemental to the first act, extended the time allowed to front proprietors to enter their back lands to the 15th June, 1836. He entered a written notice with the register of the land office at Ouachita for his claim as front proprietor to the lands described in his answer, being the quantity to which he was entitled, in the rear of his front lands, by virtue of the acts of Congress already mentioned. He alleges that he, at the same time, tendered to the receiver of the land office payment of said back concessions, which the receiver refused. He further alleges that his claim was not recognised by the commissioners of the land office, and that they refused to receive the price tendered by him for the lands, on the ground, as declared by them, that the land claimed by him as a back concession *granted* on another bayou, and that his right was excluded by the proviso in the act of Congress, which declares that this right of "pre-emption" shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water course. He avers that he can prove that the lands which he claims as back concessions do not border on any creek, bayou, or water course, and that he is entitled to have the same by virtue of the acts of Congress, having tendered the money therefor. He further avers that the plaintiffs have illegally and unjustly set up claim by virtue of the titles set forth in their petition to his aforesaid back concession, of which he is in possession. Assuming, then, the capacity of plaintiff, he pleadsin reconvention, that he is the lawful owner of so much of the lands claimed by the plaintiffs as are embraced in the aforesaid back concessions claimed by him, and prays that he may be decreed to be the legal owner thereof. That the certificates granted by the commissioners of the land office to Sparrow & Whittlesey, or either of them, may be avoided and annulled; and that if patents have already issued in their favor for the said lands, the plaintiffs may be decreed to convey all the right, title, and interest, by virtue of said patents to him; and that he may be quieted in his title and possession, and recover judgment against the plaintiffs for the sum of one thousand dollars damages for his illegal pretensions.

From the view of the pleadings here presented two questions arise for my consideration. First. Are the plaintiffs protected by the proviso of the act of Congress of June 15th, 1832, which says that the right of pre-emption granted by the law shall not extend so far in depth as to include lands fit for cultivation bordering on another river, creek, bayou, or water course? And,

Secondly. Were the lands offered for sale before the passage of the

act of 1832, and therefore legally *legally* entered by Sparrow & Whittlesey?

Much evidence has been introduced to establish the character of the bayou called *Mill bayou*, upon which the land in question, or part thereof, borders. It has been strenuously contended by the defendant's counsel that it is not such a bayou, within the meaning of the proviso of the act of Congress, as should deprive their client of the right to a back concession. The subject is not free from difficulty; and much has been said, with great plausibility, on the general object and policy of the law. But without attempting to follow closely the counsel in the rigid scrutiny to which they have subjected the evidence, it is clear that the bayou in question is recognised as such by all the witnesses; that it is universally known as Mill bayou. It is equally clear that the act of Congress does not declare what kind of a bayou is understood. It is not pretended by the counsel that a navigable bayou is intended. The law does not say so, nor does it say that it must contain running water at all seasons of the year. Let us, then, take for granted all the witnesses for the defendant state. That when the river is low this bayou is almost entirely dry; it is yet well established that the land bordering on it is generally arable, and fit for cultivation. And this fact is, in my opinion, the criterion by which the intention of Congress is to be ascertained. If the bayou be sufficiently large and deep to drain the adjoining country and render it fit for cultivation, it is such a bayou within the meaning of the law as will deprive the defendant of the back concession. The right of the pre-emption was never intended to be given to front proprietors, except to acquire such lands in their rear as were *not* fit for cultivation, but which would be necessary for timber and pasturage. Lands fit for cultivation are, in my opinion, to be regarded as open to entry for every citizen upon a perfect equality. If this be not the proper construction to be given to the proviso of the act of 1832, I am at a loss to understand what possible object Congress had in view in using the words "fit for cultivation." It appears that, upon evidence being furnished to the commissioner of the land office that the lands were fit for cultivation, and bordered on another river, bayou, or water course, the application of the defendant to enter the back lands was rejected. With such evidence before him, I am unable to see how the commissioner could have acted otherwise.

I proceed now to examine the second question. It appears by the testimony of the register of the land office, that the township wherein the lands in question are situated, was offered for sale, pursuant to the proclamation of the President, on the 3d Monday of November, 1829. Was it the intention of Congress that the provisions of the law of 1832 should operate on land already offered for sale? That law provides that all notices of such claims (to back concessions) shall be entered, and the money paid thereon, at least three weeks before such period as may be designated by the President of the United States for the public sale of the lands in the township *in the township* in which such claims

may be situated; and all claims not so entered shall be liable to be sold as other public lands."

In the case of Thompson vs. Schlater, (13 La., 119,) the supreme court of the State hold the following language with reference to this act of Congress: "If the land was offered for sale after the passage of the act of 1832, he (the front proprietor) lost the preference to which he was entitled by his negligence; if it was offered before the passage of that act, he could no longer fulfil the condition upon which only the preference was given; and although he might, perhaps, enter the land in the form of a double concession, he could not do so to the prejudice of previous entries."

If the act of 1832 had provided that, when the back lands had not been offered for sale, notice of the claim should be entered, and payment made three weeks before the period designated by the President for that purpose, it would be a fair inference that the act was intended to apply to all back lands. But the wording of that act is clearly unambiguous and without reservation. It says: "All notices of such claims shall be entered," which cannot mean that only a part of them shall be entered.

Congress was aware of the situation of the public lands in Louisiana. They knew that part of those lands had been offered at public [sale] and others not. If they imposed an impossible condition on some of the front proprietors, it was because they did not intend that the privilege granted should extend to them. In this view of the subject I fully concur.

And do now order, adjudge, and decree, that the plaintiffs Lapice & Whittlesy be quieted in their title to, and possession of, the land set forth and described in their petition, and that the defendant, Francis Surgett, be forever enjoined from setting up any claims or pretensions to the same. It is further ordered, adjudged, and decreed, that the said defendant do pay the costs of this suit.

Judgment rendered, April 7th, 1845.

Judgment signed, June 27th, 1845.

(Signed) THEO. H. McCALEB, [L. S.]
United States judge.

And on the 27th of June, 1845, the following order for granting appeal was entered on the minutes, to wit:

FRIDAY, *27th June*, 1845.

LAPICE & WHITTLESY
vs.
F. SURGETT. } No. 872.

On motion of R. N. & A. N. Ogden, esq's., counsel for appellee, an appeal is allowed him to the next term of the Supreme Court of the United States, from the judgment rendered in this case, upon his giving bond and security in the sum of two thousand dollars.

J. B. Byrne was accepted by the court as surety on said bond.

And on the 27th of June, 1845, the following appeal bond was filed, to wit:

Know all men by these presents, that we, Francis Surgett, residing in Adams county, State of Mississippi, as principal, and J. B. Byrne, residing in the city of New Orleans, and State of Louisiana, as security, are held and firmly bound, jointly and severally, unto P. M. Lapice, and to Thomas Alexander, curator of the absent heirs of the succession of Edward Whittlesy, and to the heirs of said Whittlesy, in the sum of two thousand dollars, lawful money of the United States of America, to be paid to the said parties aforesaid, their heirs, executors, administrators, and assigns; for which payment well and truly be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 27th day of June, (1845,) in the year of our Lord eighteen hundred and forty-five.

Whereas in a certain suit, numbered 872 on the docket of this court, to wit, the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, and entitled, P. M. Lapice and Edward Whittlesy vs. Francis Surgett, the said Francis Surgett has this day obtained from the honorable the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, an order, granting him an appeal in said suit from the decree of the said circuit court therein rendered, to the Supreme Court of the United States, returnable at the next term of said court, on the first Monday of December next.

Now, the condition of the above obligation is, that we, the above bounden Francis Surgett and J. B. Byrne, will well and truly pay to the said plaintiffs in said suit all such damages as they may recover against us in case it should be decided that the said appeal was wrongfully obtained.

F. SURGETT. [L. S.]

By his attornies, (Signed) R. N. & A. N. OGDEN.

(Signed) J. B. BYRNE.

Signed, sealed and delivered, in the presence of

(Signed) DUNCAN N. HENNEN.

Acknowledged by the parties in the presence of the clerk, on 27th June, 1845.

(Signed) DUNCAN N. HENNEN, *Clerk*.

Circuit court of the United States for the fifth judicial circuit, district of Louisiana.

I, Edmund Randolph, clerk of the circuit court of the United States in and for the fifth judicial circuit and district of Louisiana, do hereby certify, that the foregoing (101) pages contain a full, faithful, and true transcript of the record and proceedings, together with all the evidence adduced, and the diagrams annexed, on the trial of Peter M. Lapice and Edward Whittlesy, plaintiffs, *versus* Francis Surgett, defendant, so far as the same now remain on file of original record in said office.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of New Orleans, this [L. S.] fourteenth day of July, A. D. 1845, and 70th year of the American independence.

Attest, ED. RANDOLPH, *Clerk*.

I, Theodore H. McCaleb, judge of the district court of the United States for the district of Louisiana, and one of the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana, do hereby certify, that Edmund Randolph, who signed the foregoing certificate, is clerk of the circuit court of the United States, for the fifth judicial circuit and district of Louisiana, and was at the time of so doing, and that full faith and credit are due to his acts as such, and that the foregoing certificate is in due form of law.

Witness my hand and seal, this fourteenth day of July, A. D. 1845.

THEO. H. McCALEB. [L. S.]

Costs of this transcript and plans, $76 10, paid by appellant.

Filed 16th March, 1846.